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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 187.

CHARLES W. BOYNTON, PLAINTIFF IN ERROR,

vs.

PLOWDEN H. BALL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

FILED OCTOBER 22, 1883.

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a *Appeal from Appellate Court, 2d District.*

Supreme Court, State of Illinois, Northern Grand Division. At the March Term, A. D. 1883.

At a supreme court begun and held at Ottawa on Tuesday, the sixth day of March, in the year of our Lord one thousand eight hundred and eighty three, within and for the northern grand division of the State of Illinois.

Present: John M. Scott, chief justice; Pinkney H. Walker, justice; Jno. Scholfield, justice; T. Lyle Dickey, justice; John H. Mulkey, justice; Benj. R. Sheldon, justice; Alfred M. Craig, justice; James McCartney, attorney general; W. R. Milligan, sheriff; Everell F. Dutton, clerk.

CHARLES W. BOYNTON
vs.
PLOWDEN B. BALL. } No. 534.

b Be it remembered that heretofore, to wit, on the 23d day of February, A. D. 1882, there was filed in the office of the clerk of said supreme court certain transcripts of record from the circuit court of Stephenson county and the appellate court of the second district of Illinois, with the assignment of errors thereon, which said transcripts and errors assigned thereon are in words and figures following, to wit:

1 UNITED STATES OF AMERICA.

STATE OF ILLINOIS, } ss:
Stephenson County, }

Pleas before the Honorable William Brown, one of the judges of the thirteenth judicial circuit in the State of Illinois, and at the hereinafter-named term of said court, in the State aforesaid, the presiding judge, and at a term thereof begun and held at the court-house in the city of Freeport, in said county, on the first Monday (being the third day) of September, in the year of our Lord one thousand eight hundred and seventy-seven, and of the Independence of the United States the 101st.

Present: Honorable William Brown, judge of the thirteenth circuit of the State of Illinois; James S. Cochran, State's attorney; Daniel S. Brewster, clerk; Jesse R. Leigh, sheriff.

Attest: D. S. BREWSTER, *Clerk.*

Be it remembered that heretofore, to wit, on the 16th day of April, A. D. 1877, a precipe for a summons was filed in said court, and a summons issued thereon, as by said precipe directed, returnable to said September term, A. D. 1877, of said court and delivered to the sheriff of said county to execute, and which said summons was duly returned as personally served by the sheriff of said Stephenson county, but has been lost from the files in the case, and hence is not set out at length in this record.

And be it further remembered that afterwards, to wit, and on the

23rd day of November, A. D. 1877, in vacation after the said
2 September term, 1877, of said circuit court, a declaration was filed in said court, which said declaration is in the words and figures following, to wit:

In the Stephenson County Circuit Court. December Term, A. D. 1877.

STATE OF ILLINOIS, } ss:
Stephenson County, }

Plowden H. Ball, as survivor of Edgar F. Griffin, deceased, plaintiff in this suit, by Crain, his attorney, complained of Charles W. Boynton, defendant, who is summoned of a plea, that he render to the plaintiff the sum of fifteen thousand dollars, which he unjustly detains from said plaintiff: For that whereas heretofore, to wit, at the September term, A. D. 1865, of the Stephenson county circuit court, the said plaintiff and said Edgar F. Griffin, now deceased, in the lifetime of him, the said Edgar F. Griffin, in a certain proceeding at their suit, on the chancery side of said last-mentioned court, wherein they were complainants, and said defendant was impleaded with Jennie Boynton, widow, and Frederick S. and Clara Boynton, heirs-at-law, of Stewart G. Boynton, deceased; Theophilus K. Greenwood, administrator of the estate of Stewart G. Boynton, deceased; Wallace W. Boynton, and Jerome C. Boynton, as defendants, it was ordered, adjudged, and decreed, and said last-mentioned court did thereby order, adjudge, and decree, that said Charles W. Boynton pay said complainants the sum of four thousand six hundred and twelve $\frac{47}{100}$ dollars, with interest thereon from the 20th day of November, A. D. 1859, to 20th day of September, A. D. 1865, then making, including principal and interest, six thousand two hundred twenty-three $\frac{99}{100}$ dollars, and also, in addition thereto, that
3 said Charles W. Boynton pay three-fourths of the costs of that suit, as by said decree more fully appears; and said plaintiff avers that the three-fourths of said costs so adjudged to be paid by said defendant, Charles W. Boynton, amounted to a large sum, to wit, five hundred dollars, of all which the said Charles W. Boynton afterwards, to wit, on the day and year last aforesaid, had notice, to wit, at the county aforesaid, which said decree still remains in full force and effect, not in any wise reversed, set aside, or annulled, or otherwise vacated; and said complainants in the lifetime of said Edgar F. Griffin had not nor had either of them, nor has said plaintiff since the decease of said Edgar F. Griffin, obtained any satisfaction of or upon the said decree for said several sums of money so ordered, adjudged, and decreed as aforesaid, whereby an action hath accrued to the said plaintiff to demand and have of and from said Charles W. Boynton, the now here defendant, a large sum of money, to wit, the sum of seven thousand five hundred dollars, parcel of said sum above demanded.

And whereas, also, said defendant afterwards, to wit, on the twenty-fourth day of September, A. D. 1865, in the lifetime of said Edgar F. Griffin, now deceased, at said county, became and was indebted to

said plaintiff and said Griffin in the further sum of seven thousand five hundred dollars upon and by virtue of a certain other decree before then made and found in the Stephenson county circuit court in a certain matter then depending in said last-mentioned court, wherein said Plowden H. Ball and said Edgar F. Griffin were complainants, and said defendant was impleaded with Jennie Boynton, widow, and Frederick S. and Clara Boynton, heirs-at-law, of Stewart G. Boynton, deceased; Theophilus K. Greenwood, administrator of the estate of Stewart G. Boynton, deceased; Wallace W.
4 Boynton, and Jerome C. Boynton, by which last-mentioned decree it was ordered, adjudged, and decreed that said Charles W. Boynton pay said complainants divers sums of money, in the whole amounting to seven thousand dollars, and also three-fourths of the costs in that suit and proceeding, which three-fourths of said costs were a large sum, to wit, the sum of five hundred dollars, in the whole amounting to a very large sum [of] money, to wit, seven thousand five hundred dollars, of which said Charles W. Boynton had notice, to wit, at the county aforesaid, and said plaintiff avers that said sum last mentioned was, during the lifetime of said Edgar F. Griffin, wholly unpaid and unsatisfied to said complainants, or either of them, and since the decease of said Edgar F. Griffin remains wholly unpaid and unsatisfied to said plaintiff, to wit, at the county aforesaid, whereby said action hath accrued to said plaintiff to have and demand of and from said defendant said last-named sum, other parcel of said sum above demanded.

Yet the said defendant, the said Charles W. Boynton, although often requested so to do, hath not as yet paid said sum of fifteen thousand dollars above demanded, or any part, to said Plowden H. Ball and Edgar F. Griffin in the lifetime of him, the said Edgar F. Griffin, nor to the said plaintiff since the decease of him, the said Edgar F. Griffin, but so to do hath wholly refused, and still does refuse, to the damage of said plaintiff fifteen thousand dollars, and therefore he brings suit.

J. A. CRAIN,
Pff's Att'y.

In the Stephenson County Circuit Court. December Term, A. D. 1877.

PLOWDEN H. Ball, Survivor of Edgar F. Griffin, Deceased,
5 Plaintiff,
vs.
CHARLES W. BOYNTON, Def't.

STATE OF ILLINOIS, }
Stephenson County, } *ss:*

J. Addison Crain, of lawful age, of said county, being first sworn, says that he has been and is the attorney of the plaintiff in the above-entitled cause now pending in said court, and that said defendant is justly indebted to said plaintiff by virtue of the decree set forth and described in the first count in said plaintiff's declaration to the

amount of $6,223.99, and interest thereon at the rate of six per cent. per annum from 23rd day of September, A. D. 1865, amounting in all to the sum of $10,767.50, after allowing said defendant all his just credits, deductions, and set-offs.

J. ADDISON CRAIN.

Subscribed and sworn to by said J. Addison Crain before me this 25th day of November, A. D. 1877.

D. S. BREWSTER, *Clerk.*

Copy of Decree on which Action is Brought.

In the Circuit Court of Stephenson County, Illinois, of the September Term, A. D. 1865. In Chancery.

PLOWDEN H. BALL and EDGAR F. GRIFFIN

vs.

JENNIE BOYNTON, Widow, and FREDERICK S. and CLARA BOYNTON, Heirs-at-Law, of Stewart G. Boynton, Deceased; Theophilus K. Greenwood, Administrator of the Estate of Stewart G. Boynton, Deceased; Wallace W. Boynton, Charles W. Boynton, and Jerome C. Boynton.

STATE OF ILLINOIS, *Stephenson County:*

This cause having been brought to a hearing and heard upon the bill taken as confessed against the said Jennie Boynton and upon bill, answers, and replications as to all the other defendants above named, and the court having heard the evidence and arguments of counsel for the respective parties, it appears to the court from the evidence and pleadings in the cause that the complainants herein recovered a judgment against the said Stewart G. and Wallace W. Boynton, as stated in said bill of complaint, and that execution upon the said judgment was issued and returned unsatisfied, as in said bill is stated, and that there was due from the said Stewart G. and Wallace W. Boynton to the complainants herein at the time of the filing of the bill herein on said judgment the sum of six thousand one hundred & twenty-two dollars and sixty-one cents, and sixty-one dollars and twenty-two cents interest thereon from the 6th day of October, A. D. 1859, the time of its rendition, to the 6th day of December, A. D. 1859; and it appears to the court from the evidence that the said principal and interest was then and is now due and unpaid from the said Stewart G. & Wallace W. Boynton to the said complainants, and also that the said judgment has not been paid and that it is now in full force and entirely unsatisfied, and that the said judgment and interest thereon from the rendition thereof to the present time is entirely unpaid and unsatisfied.

And it further appearing to the court from the evidence that the said Stewart G. Boynton, in the fall of A. D. 1851, advanced to and furnished the said Charles W. Boynton fifteen hundred dollars in money for the purpose of purchasing land in the county of Fayette, in this State, and that the said Charles W. Boynton, with said fifteen

hundred dollars so advanced to him by the said Stewart G.
7 Boynton, purchased, in connection with one Joel A. Park, eleven hundred and eighty-four acres of timber land in said county of Fayette, in this State, and that said land was entered in the name of the said Charles W. Boynton and the said Joel A. Park, and that the said Joel A. Park and the said Charles W. Boynton held the legal title to said land, and that the said Charles W. Boynton held the legal title to one-half of the said land—that is to say, in five hundred and ninety-two acres of the said land—and that that portion of said land of which the said Charles W. Boynton held the legal title was purchased with the said fifteen hundred dollars so as aforesaid furnished and advanced to him by the said Stewart G. Boynton.

And it further appearing to the court that the said Charles W. Boynton was to have an interest in the said land for locating and entering the same and no more, and that the balance of the interest in the said land was in the said Stewart G. Boynton, he having furnished the money to enter the same; and it further appearing to the court that the said Charles W. Boynton had and held the legal title to the said land until the 20th day of November, A. D. 1859, and that on the last-named day the said Stewart G. Boynton had and owned all the real interest in the said land of which the said Charles W. Boynton held the legal title, except the interest of the said Charles W. Boynton had in the same, for locating and entering the same; and it further appearing to the court from the evidence that the said Charles W. Boynton about the 20th day of November, A. D. 1859, purchased a large stock of goods of one Joseph R. Shelley in the city of Freeport, Illinois, for the sum of fifteen thousand dollars, and that in part payment for said goods the said Charles W. Boynton conveyed to the said Joseph R. Shelley the said land
8 at eleven dollars per acre, and that the said Joseph R. Shelley received from the said Charles W. Boynton said conveyance of said land in part payment of said goods at eleven dollars per acre.

And it further appearing to the court from the evidence that at the time the said lands were conveyed by the said Charles W. Boynton to the said Joseph R. Shelley, as aforesaid, the said Stewart G. Boynton had and held an interest in the said lands to the amount of four thousand six hundred and twelve dollars and seven cents, and that the said Charles W. Boynton had an interest in the said lands for services in locating and entering the same to the amount of one thousand eight hundred and ninety-nine dollars, being one-fourth of the value and one-half of the difference between one-fourth and one-third of the value of the said land at the sum of eleven dollars per acre; and it further appearing to the court from the evidence that the said Charles W. Boynton has still in his hands the interest of the said Stewart G. Boynton arising from the avails on the exchange of the said lands with the said Shelley for the said goods, and that said avails amounted on the said exchange, on the 20th day of November, 1859, to the said sum of four thousand six hundred and twelve dollars and forty-seven cents, and that the said

Charles W. Boynton has not in any manner accounted for the same, and that he, the said Charles W. Boynton, has the same still in his hands; and it appearing from the evidence that the said Charles W. Boynton has not and ought of right to account to the complainants herein for the said sum of four thousand six hundred and twelve and $\frac{47}{100}$ dollars, with interest thereon from the 20th day of November, A. D. 1859, to the 20th day of September, A. D. 1865, amounts to the sum of sixteen hundred and ten and $\frac{52}{100}$ dollars:

It is therefore ordered, adjudged, and decreed, and the
9 court does hereby order, adjudge, and decree, that the said Charles W. Boynton pay to the complainants herein the said sum of four thousand six hundred and twelve and $\frac{47}{100}$ dollars with interest thereon from the 20th day of November, A. D. 1859, to the 20th day of September, A. D. 1865, making, including principal and interest, six thousand two hundred and twenty three and $\frac{99}{100}$ dollars, and that the complainants herein have execution therefor, and also in addition thereto three-fourths costs of this suit, and that complainants have execution therefor; and it appearing to the court from the evidence that the said Stewart G. and Wallace W. Boynton, on or about the 27th day of June, A. D. 1859, conveyed, by way of chattel mortgage, a certain warehouse, furniture, and fixtures to the said defendant, Jerome C. Boynton, under the fraudulent pretext of securing to the said Jerome C. Boynton a note of the same date made by them to him of one thousand dollars; and it appearing to the court from the evidence that on or about the 29th day of June, A. D. 1859, the said Stewart G. and Wallace W. Boynton assigned to the said Jerome C. Boynton their interest in a certain contract for the conveyance of certain lands in Stephenson county mentioned in it from the Illinois Central Railroad Company to Snyder A. Stevens, offered in evidence in this cause, and which came to them, the said Stewart G. and Wallace W., by assignment, for a consideration, as appears upon the face of said assignment, of three hundred dollars, and, at or about the same time, the said Stewart G. and Wallace W. Boynton assigned and transferred to the said Jerome C. Boynton a certain debt of about one thousand dollars from S. W. & James McKees to them, and also a lease of two hundred and forty acres of land in Stephenson county, Illinois; and it further appearing to the court
from the evidence that the making and delivery of the said
10 chattel mortgage and note, and the endorsement thereon as aforesaid, and the said assignment of the said contract from the Illinois Central Railroad Company, and the assignment of the said debt of the said McKees and the said lease from the said Stewart G. and Wallace W. Boynton to the said Jerome C. Boynton were all and every of them fraudulent and void as to the complainants herein.

And it further appearing to the court from the evidence that the said contract with the Illinois Central Railroad Company offered in evidence—that is to say, the interest in the said contract obtained by the said Jerome C. Boynton from Stewart G. and Wallace W. Boynton—was, in November, 1860, surrendered up to the Illinois

Central Railroad Company by Jerome C. Boynton, and by it cancelled at his instance, and that the interest on said contract which the said Jerome C. Boynton had obtained from the said Stewart G. and Wallace W. Boynton was, at the time he so surrendered it to the said railroad company and caused it to be cancelled, worth eight hundred dollars, and that by the procurement of the said Jerome C. Boynton the said *the said* railroad company has conveyed away said land mentioned in said contract to other parties.

And it further appearing to the court from the evidence that the said Jerome C. Boynton has now in his hands the avails of said property, and for his liability on account thereof and his dealings in respect thereto, to the amount of one thousand and fifty dollars, which the said Jerome C. Boynton ought to account for and pay over to the complainants herein, they hereby relinquishing all claim to all of said property itself, it is therefore ordered, adjudged, and decreed, and the court orders, adjudges, and decrees, that the said Jerome C. Boynton pay to the complainants herein the sum of one thousand and fifty dollars and one-fourth of the costs in this suit and that
11 the complainants have execution thereof; and it further appearing to the court from the evidence that the complainants herein are entitled to the rents of the farm in Stephenson county, being the same lands embraced in the said contract with the Illinois Central Railroad Company, for the year A. D. 1860, mentioned in the evidence, which are now in the hands of the receiver in this cause, which rents amount in all to the sum of eight hundred and thirty-six dollars and twenty-seven cents, the same to be applied and credited on the said judgment against Stewart G. and Wallace W. Boynton on the 1st of October, A. D. 1860: It is therefore further ordered, adjudged, and decreed that the receiver herein pay said rents to complainants herein.

BENJ. R. SHELDON.

And afterwards, to wit, on Tuesday, the 19th day, of March, A. D. 1878, the same being one of the days of the regular March term, A. D. 1878, of said court, the following among other proceedings were had, as appears to us of court record, to wit:

PLOWDEN H. BALL, Survivor of Edgar F. Griffin,
vs. } 61.
CHARLES W. BOYNTON.

Debt.

And now comes the said plaintiff, by J. A. Crain, his attorney, and the said defendant, by J. I. Neff, his attorney, and on motion of the plaintiff the defendant is ruled to plead by Monday morning next.

And on Thursday, the 4th day of April, 1878, and as yet of said March term, A. D. 1878, of said court the following among other proceedings were had, to wit:

PLOWDEN H. BALL, Survivor of Edgar F. Griffin,
vs. } 61.
CHARLES W. BOYNTON.

Debt.

12 Now comes said defendant, by his attorney, and files his plea herein.

(The following is a copy of the defendant's plea filed April 4, 1879, referred to in the above entry, to wit:)

STATE OF ILLINOIS, }
Stephenson County, } *ss:*

In the Circuit Court of said Stephenson County, of the March Term, A. D. 1878.

PLOWDEN H. BALL, as Survivor of Edgar F. Griffiin, Deceased,
vs.
CHARLES W. BOYNTON.

And the defendant, by James I. Neff, his attorney, comes and defends the wrong and injury when, etc., and says that he does not owe the said sum of money above demanded or any part thereof in manner and form as the plaintiff hath above thereof complained against him. And of this the defendant puts himself upon the country, etc.

JAMES I. NEFF,
Defendant's Atty.

And said plaintiff doth the like.

J. A. CRAIN, *Pff's Atty.*

And afterwards, to wit, on the 9th day of December, A. D. 1879, the same being one of the regular days of the December term, 1879, of said circuit court, the following among other proceeding were had and entered of court record, to wit:

In the Stephenson County Circuit Court, of the December Term, A. D. 1879.

13 PLOWDEN H. BALL, as Survivor of Edgar F. Griffin, Deceased, Plaintiff,
vs.
CHARLES W. BOYNTON, Defendant.

And now, on this day, comes here into court the said plaintiff, by J. A. Crain, his attorney, and the said defendant, by James I. Neff, his attorney, and a jury having been heretofore by the parties hereto waived, and the issues herein submitted to the court for trial thereof, and said cause having now here been called for trial upon the issues joined, and the court now having heard the evidence adduced, does now here find said issues for the plaintiff, and that said defendant is indebted to said plaintiff in the sum of six thousand two hundred twenty-three $\frac{39}{100}$ dollars debt, and that said plaintiff's damages by

reason of the non-payment of said debt are the sum of five thousand two hundred thirty-four $\frac{99}{100}$ dollars.

Wherefore it is now here by the court considered that said plaintiff have and recover of said defendant his said debt of six thousand two hundred twenty-three $\frac{99}{100}$ dollars, together with his, said plaintiff's, damages assessed at said sum of five thousand two hundred thirty-four $\frac{99}{100}$ dollars and his cost in this case, and that said plaintiff have his execution for said debt and for said damages, together with his said costs.

JOHN V. EUSTACE, *Judge.*

And afterwards, to wit, in vacation after said December term, A. D. 1879, of said circuit —, a precipe for execution was filed in said court, which said precipe is in words and figures following, viz:

14 In the Stephenson County Circuit Court. December Term, A. D. 1879.

In the Matter of PLOWDEN H. BALL as Survivor of Edgar F. Griffin, Deceased, Plaintiff,

vs.

CHARLES W. BOYNTON, Defendant.

STATE OF ILLINOIS, *Stephenson County,* } *ss:*

To the clerk of said court:

You will please issue execution in the above-entitled cause directed to the sheriff of said county.

Dated the 20 day of February, 1880.

J. A. CRAIN, *Att'y.*

And afterwards, on the 21st day of February, 1880, in vacation, after said December term, 1879, of said court, an execution was issued out of said —, as directed in and by said precipe, and is in words and figures following, to wit, together with the return of the sheriff in said execution:

15 No. 13526.

STATE OF ILLINOIS, *Stephenson County,* } *sct:*

The people of the State of Illinois to the sheriff of Stephenson county, Greeting:

We command you that of the goods, chattels, lands, and tenements of Charles W. Boynton in your county you cause to be made the sum of six thousand two hundred twenty-three and $\frac{99}{100}$ dollars debt and five thousand two hundred and thirty-four dollars and ninety-nine cents damages and six dollars costs, which Plowden H. Ball, as survivor of Edgar F. Griffin, deceased, lately recovered against him in the Stephenson county circuit court, as appears of record; and

this you are not to omit under the penalty of what the law prescribes; and have you those moneys at the clerk's office of said court, at Freeport, within ninety-days from the date hereof, and also this writ.

Witness Daniel S. Brewster, clerk of said court, and the seal thereof, at Freeport, this 21st day of February, A. D. 1880.

Attest: D. S. BREWSTER, *Clerk*,
[SEAL.] By E. P. HODGES, *Deputy*.

The sheriff will collect interest on both debt & damages from the 9th day of December, A. D. 1879.

D. S. BREWSTER, *Clerk*,
By E. P. HODGES, *Deputy*.

15½ [Endorsed:] Stephenson county circuit court, Ill. No. 13526. *Fi. fa.* Fee-book R, page 67. P. H. Ball, survivor, &c., *versus* C. W. Boynton. *Fi. fa.* execution. This writ calls for: $6,223.99, debt; $5,234.99, da's; $6.00, costs; def't's fee bill, $1.80; total amount, $—. Judgement, —— 18, —; this writ issued —— 18, —; return day, —— 18, —. Sheriff's fees: Levying execution —; advertising property —; — miles traveled —; commission on $—, —; certificate of purchase, —; returning execution, 10; total amount $10. ——, sheriff. J. A. Crain, attorney.

Received this execution for collection this 21st day of Feb., in the year of our Lord one thousand eight hundred and eighty, at the hour of 9.30 o'clock a. m.

J. R. LEIGH, *Sheriff*.

This execution returned unsatisfied and unpaid, the within-named defendant not found in my county, this 20th day of May, A. D. 1880.

J. R. LEIGH, *Sheriff*.

16 And afterwards, to wit, on Friday, the 25th day of March, 1881, the same being one of the regular days of the March term, A. D. 1881, of said circuit court, the following among other proceedings were had and appear of record, to wit:

PLOWDEN H. BALL, as Survivor of Edgar F. Griffin,
vs. } 62.
CHARLES W. BOYNTON.

Redocketed.

Now, on this day, comes the defendant, by his attorneys, Messrs. Swett, Bates and Haskell and H. C. Hyde, and files his motion for a perpetual stay of execution on the judgment heretofore rendered in this court in this cause, to wit, on the 9th day of December, A. D. 1879, and also files a certified copy of his discharge in bankruptcy. Defendant also files notice and affidavit of service of the same to plaintiff, and defendant also files affidavit of John Ling and affidavit of Thomas Bates and of Charles W. Boynton.

And be it further remembered that on the 27th day of April, A.

D. 1881, the said defendant filed in said court his bill of exceptions, a copy of which is as follows, to wit:

STATE OF ILLINOIS, } ss:
Stephenson County, }

In the Circuit Court of said County. To the March Term, A. D. 1881.

PLOWDEN H. BALL, Survivor of Edgar F. Griffin, Deceased,
vs.
17 CHARLES W. BOYNTON.

Be it remembered that on the 25th day of March, A. D. 1881, the same being one of the days of the said March term, A. D. 1881, of the said court, the said Charles W. Boynton, defendant in the above-entitled suit, by his counsel, filed in said court in said cause a motion for a perpetual stay of execution upon the judgment theretofore rendered in said cause, which said motion is in the words and figures following:

STATE OF ILLINOIS, } ss:
Stephenson County, }

In the Circuit Court of said County. March Term, A. D. 1881.

PLOWDEN H. BALL, in his Own Right and as Survivor of Edgar F. Griffin, Deceased,
vs.
CHARLES W. BOYNTON.

Judgment *vs.* defendant at the December term, A. D. 1879, for $6,223.99 debt and 5,234.99 damages and costs.

And now comes Charles W. Boynton, the defendant in the above-entitled cause, and against whom said judgment was rendered therein by said court at the December term, A. D. 1879, thereof, and by H. C. Hyde and Swett, Bates & Haskell, his attorneys, moves the court upon the evidence and proofs herewith offered to
18 make and enter an order in said cause or judgment perpetually staying the issue of an execution on said judgment, for the reason that by proceedings in bankruptcy had heretofore in the district court of the United States in and for the northern district of Illinois the said defendant, Charles W. Boynton, defendant in said judgment, was, by said last-named court, on the 15th day of April, A. D. 1878, duly declared a bankrupt under and by virtue of the United States statute in that case made and provided, and was, by said last-named court, afterwards and on the 23rd day of December, A. D. 1880, duly discharged and released from all his debts which were by law provable in said bankruptcy proceedings against his estate, and because the indebtedness upon which said judgment was rendered in said first-mentioned court was at the time of said Boynton's adjudications in bankruptcy a decree in chancery theretofore obtained in said first-named court; that said decree was scheduled in bankruptcy by said defendant, Charles W. Boynton, and was by

law provable against said bankrupt's estate in said proceedings in bankruptcy and existed in the form of a decree in chancery prior to said 15th day of April, A. D. 1878, and said decree and judgment thereon was not and is not by law excepted from the operation of said discharge.

CHARLES W. BOYNTON,
By HENRY C. HYDE AND
SWETT, BATES & HASKELL,
Def't's Att'ys.

And at the same time the said defendant, Charles W. Boynton, filed in said court in said cause the following notice and affidavit of service of said notice of said motion upon Plowden H. Ball, plaintiff in said suit:

Notice.

19 In the Circuit Court of Stephenson County. To the March Term, 1881.

PLOWDEN H. BALL *et al. vs.* CHARLES W. BOYNTON.

STATE OF ILLINOIS, }
Cook County, } *ss:*

To Plowden H. Ball, Esq., Erie, Pennsylvania:

You are hereby notified that on Tuesday, March 22nd, 1881, at 10 o'clock a. m., or as soon thereafter as counsel can be heard, we shall, before the judge of the circuit court of Stephenson county, at his court-room, in the city of Freeport, Stephenson county, Illinois, move and ask for a perpetual stay of execution on the judgment or decree heretofore entered in said cause, on the ground that since the judgment or decree was entered in said cause the defendant has been discharged from bankruptcy in the United States district court for the northern district of Illinois, which discharge we shall claim is a bar to said debt and judgment.

At which time and place you may appear if you see fit so to do.

SWETT, BATES & HASKELL,
Att'ys for Def't, Charles W. Boynton.

STATE OF PENNSYLVANIA, }
County of Erie, } *ss:*

L. J. Van Auden, being first duly sworn, says that he served the above notice on Plowden H. Ball by leaving with him a copy of the same this 9th day of March, A. D. 1881.

L. J. VAN AUDEN.

20 Sworn & subscribed before me this 9th day of March, 1881.
[SEAL.] GEO. P. GRIFFITH,
Notary Public.

And in support of said motion said defendant filed in said cause and read in evidence to said court the following affidavits:

The affidavit and exhibits of Charles W. Boynton is in words and figures following, to wit:

STATE OF ILLINOIS, }
Stephenson County, } *ss:*

In the Circuit Court of Stephenson County.

PLOWDEN H. BALL *et al. vs.* CHARLES W. BOYNTON.

STATE OF ILLINOIS, }
Cook County, } *ss:*

Charles W. Boynton, being first duly sworn, deposes and says that he is the defendant in the above-entitled cause, and that some years ago the complainants or plaintiffs in the above cause secured a decree in this court against affiant, which decree remained unsatisfied until about three years ago, as near as affiant can remember, when he was informed that, as the statute of limitation had nearly run, *that* complainants had taken steps to revive said decree in this court.

21 Affiant further swears that whilst the proceedings were pending in this court to revive said decree or judgment, and on or about the 16th day of April, A. D. 1878, he was duly adjudicated a bankrupt in the district court of the United States for the northern district of Illinois, and that on or about the 18th day of April, 1879, hearing that the proceedings were still pending for the revival of said judgment or decree, he, under the advice of his counsel, Messrs. Higgins, Sweet & Bates, sent to his brother, Jerome Boynton, at Freeport, a certified copy of his adjudication in bankruptcy, with instructions to his said brother to hand said copy of adjudication to Henry C. Hyde or some other attorney of the city of Freeport, and to employ said attorney to go into said circuit court of Stephenson county and suggest his adjudication in bankruptcy in this case, and present said certified copy to the court and move to stay proceedings in said revival until the question of his discharge could be decided.

Affiant further swears that he did not immediately hear from his brother in regard to said instructions, but supposed the suggestion of bankruptcy had been made and the proceeding upon said revival had been stayed until about December 20th, A. D. 1880, when his brother sent the said copy of adjudication to him, saying it had not been presented.

Affiant further swears that he did not know even at that time that this judgment had been revived in this court, and when, within three or four days afterward, he obtained his discharge in bankruptcy he immediately sent said discharge to Freeport to his brother, instructing him to give said discharge to Mr. Hyde, and to be sure that he went in and attended to said suit.

Affiant further swears that a few days thereafter he received a letter from his brother, saying that Mr. Hyde had informed him that said judgment had been revived and that no suggestion for stay of proceedings had been made.

22 Affiant further swears that until this time he had not the most remote idea but that the certified copy had been presented to this court and proceedings had been stayed; and affiant says that it was wholly due to the negligence of his brother, of which negligence he had no knowledge whatever.

Affiant further swears that the certified copy of his adjudication in bankruptcy, which he procured from the district court of the United States for the northern district of Illinois and sent to his brother, is hereto attached and marked Exhibit A.

Affiant further swears that the original judgment or decree in the said cause was, as shown by the record of this court, obtained before the filing of his petition in bankruptcy, and that it was a provable debt against his estate in bankruptcy, and was scheduled in bankruptcy by him, as shown by the certified copy of his petition and schedule as hereto attached and marked Exhibit B.

Affiant further swears that service or notice of said Boynton's petition in bankruptcy was duly served upon P. H. Ball, plaintiff in said suit, according to law, as shown in the return of the marshal of the United States district court for the northern district of Illinois, a certified copy of which return is hereto attached and marked Exhibit C.

Affiant further swears that on the 23rd day of December, A. D. 1880, he received his discharge in bankruptcy, a copy of which discharge is hereto attached and marked Exhibit D, but affiant swears that said discharge was not received in time to be plead in this case. Affiant therefore prays that a perpetual stay of execution may be granted by this court in the said case, as he is informed by his attorney that his said discharge in bankruptcy is a bar to a fur-

23 ther proceeding in said cause; and further affiant saith not.

CHARLES W. BOYNTON.

Subscribed and sworn to before me this 17th day of March, A. D. 1881.

[SEAL.] EDWARD R. SWETT,
Notary Public.

"EXHIBIT A."

In the District Court of the United States for the Northern District of Illinois. In Bankruptcy.

In the Matter of CHARLES W. BOYNTON, by whom a petition for adjudication of bankruptcy was filed on the 15th day of April, A. D. 1878.

At Chicago, in said district, on the 15th day of April, A. D. 1878, before Homer N. Hibbard, Esq., register in bankruptcy.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, Homer N. Hibbard, one of the registers in bankrutcy of said court, upon good proof before me taken, do find that the said Charles W. Boynton has become a bankrupt, within the true intent and meaning of the Revised Statutes of the United States, title LXI, bankruptcy

and amendments thereof, and I do hereby declare and adjudge him a bankrupt.

Witness my hand at Chicago, in said district, on the 15th day of April, A. D. 1878.

H. N. HIBBARD,
24 *Register in Bankruptcy.*

(Endorsed:) Filed April 15, 1878. Wm. H. Bradley [clerk].

NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the district court of the United States for said northern district of Illinois, do hereby certify the above and foregoing to be a true, correct, and complete copy of the adjudication as certified to me by H. N. Hibbard, Esq., register, in the matter of Charles W. Boynton, bankrupt in bankruptcy, as appears from the records and originals now in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at my office, in Chicago, in said district, this 18th day of April, A. D. 1879.

[SEAL.] WM. H. BRADLEY, *Clerk.*

"EXHIBIT B."

District Court of the United States for the Northern District of Illinois.

To the Hon. Henry W. Blodgett, judge of the district court of the United States for the northern district of Illinois:

The petition of Charles W. Boynton, of the city of Chicago, in the county of Cook and State of Illinois and district aforesaid, respectfully represents that he has been a resident of said northern dist. of Illinois for ten years next immediately preceding the
25 filing of this petition at Chicago, Cook county, within said judicial district; that he owes debts exceeding the amount of three hundred dollars, and is unable to pay all of the same in full; that he is willing to surrender all his estate and effects for the benefit of his creditors, and desires to obtain the benefit of the provisions contained in title LXI, "bankruptcy," of the Revised Statutes of the United States and the amendments thereto; that the schedule hereto annexed, marked A, and verified by your petitioner's oath, contains a full and true statement of all his debts and (so far as it is possible to ascertain) the names and places of residence of his creditors and such further statements concerning said debts as are required by the provisions of said act.

That the schedule hereto annexed, marked B, and verified by your petitioner's oath, contains an accurate inventory of all his estate, both real and personal, assignable under the provisions of said act.

Wherefore your petitioner prays that he may be adjudged by the court to be a bankrupt within the purview of said act, and that he

may be decreed to have a certificate of discharge from all his debts provable under the same.

CHARLES W. BOYNTON.

HIGGINS & SWETT,
Att'ys for Petitioner.

"EXHIBIT B"—Continued.

Oath.

UNITED STATES OF AMERICA, } ss.
Northern District of Illinois, }

I, Charles W. Boynton, the petitioning debtor mentioned and described in the foregoing petition, do hereby make solemn oath
26 that the statements contained therein are true according to the best of my knowledge, information, and belief; and I do further — oath that I am a citizen of the United States of America, and that I will bear true faith and allegiance to the same.

CHARLES W. BOYNTON,
Petitioner.

Subscribed and sworn to before me this 15th day of April, A. D. 1878.

H. N. HIBBARD, [SEAL.]
Register.

(Endorsed:) Filed in the office of the clerk of the district court this 15th day of April, A. D. 1878, at 12.15 o'clock p. m. Wm. H. Bradley, clerk.

"EXHIBIT B"—Continued.

Schedule A 3. In the Matter of Charles W. Boynton, Bankrupt. Creditors Whose Claims are Unsecured.

Reference to ledger or voucher.	Names of creditors.	Residences and occupations.	Amount.	When & where contracted.	Nature & consideration of debt. D.
			Dollars. Cts.		
	Julius Jonas	Chicago; hide dealer ..... about	400 00	Chicago	This is a claim upon which petitioner has been sued, the validity of which petitioner denies—doesn't owe it.
	H. W. Rogers, Jr., & Bro.	Chicago; commission merchants .. about	500 00	Chicago	This is a claim upon which petitioner has been sued, but the validity of which petitioner denies—doesn't owe it.
	Northwestern Malt Co.	Chicago ..... about	250 00	Chicago	Open ac.; for money loaned.
28	Cooley & Dwight	Chicago; commission merchants .. about	400 00	1872; in Chicago	Open ac.
	G. P. Adams	" grain dealer ..... "	400 00	" "	"
	Wallace & Henderson	" commission merchants	400 00	" "	"
	Underwood & Co.	" " about	400 00	" "	"
	W. A. Shearsen	Wheaton; "	100 00	" "	"
	W. N. Sturges	Chicago; "	200 00	" "	"
	W. P. Dickinson	" warehouseman	600 00	" "	" for storage.
	Kimball & Frake	" loan agents	150 00	1875 "	Note for commissions.
	A. G. Beebe	" physicians	25 00	1872 "	Open ac.; for services.
	George Ellison	" grain dealer	200 00	1872 "	"
	Prentice & Hook	" att'ys	500 00	1872 to 1876 "	" for services.
	George Hulbert	" grain dealer	200 00	" "	"
	P. H. Ball	Erie, Pa.; banker	6,423 00	Sept., 1865	Decree in chancery. This decree was obtained by P. H. Ball & Edgar F. Griffin.

Personal-property taxes for several years not known.

All debts above named of which consideration is not stated were for failure of petitioner to fulfill his contracts for sale of grain.

CHARLES W. BOYNTON.

29 "EXHIBIT C." No. 1075.

This is to give notice that on the 28th day of August, A. D. 1878, a warrant in bankruptcy was issued against the estate of Charles W. Boynton, of Chicago, in the county of Cook and State of Illinois, who has been adjudged a bankrupt on his own petition, that the payment of any debts and the delivery of any property belonging to such bankrupt to him or for his use and the transfer of any property by him are forbidden by law.

That a meeting of the creditors of said bankrupt to prove their debts and to choose one or more assignees of his estate will be held at [a] court of bankruptcy to be holden at the office of H. N. Hibbard, No. 159 La Salle street, in the city of Chicago, Illinois, before Homer N. Hibbard, Esq., register, on the 28th day of September, A. D. 1878, at 10 o'clock a. m.

Aug. 30, 9, 2.

JESSE S. HILDRUP,
U. S. Marshal, Messenger.

HIGGINS & SWETT, *Att'ys.*

"EXHIBIT C"—Continued.

In the District Court of the United States for the Northern District of Illinois. In Bankruptcy.

In the Matter of CHARLES W. BOYNTON, bankrupt, by whom a petition for adjudication of bankruptcy was filed on the 15th day of April, A. D. 1878.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

To the U. S. marshal of said district, Greeting:

30 Whereas a petition for adjudication of bankruptcy and for relief under the act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2, 1867, was, on the 15th day [of] April, A. D. 1878, filed by Charles W. Boynton, of Chicago, in the county of Cook, in said district, upon which he has been found and adjudged a bankrupt, there being no opposing party there: You are therefore directed as messenger to cause to be published three times in the Chicago Daily Inter-Ocean and the Evening Journal, printed at Chicago, in said district (the first publication to be made forthwith), the following notice, to wit:

District Court of the United States for the Northern District of Illinois. In Bakruptcy.

In the Matter of CHARLES W. BOYNTON, bankrupt.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

This is to give notice that on the 28th day of August, 1878, a warrant of bankruptcy was issued out of the district court of the

United States for the northern district of Illinois against the estate of Charles W. Boynton, of Chicago, in the county of Cook, in said district, who has been adjudged a bankrupt on his own petition; that the payment of any debts and the delivery of any property belonging to such bankrupt to him or for his use and the transfer of any property by him are forbidden by law, and that a meeting of the creditors of said bankrupt to prove their debts and to choose one or more assignees of his estate will be held at a court of bankruptcy to be holden at the office of H. N. Hibbard, No. 159 La Salle St., Chicago, before Homer N. Hibbard, Esq., register in bankruptcy for said district, on the 28th day of September, A. D. 1878, 31 at 10 o'clock a. m.

JESSE S. HILDRUP,
U. S. Marshal for said District.

And you are further directed to serve a written or printed notice forthwith, either by mail or personally, on all creditors of said bankrupt whose names appear upon the schedule filed with his said petition, or whose names may be given you in addition thereto by the debtor, at least ten days before the meeting of creditors appointed by the court in the following form, to wit:

In the District Court of the United States for the Northern District of Illinois. In Bankruptcy.

In the Matter of CHARLES W. BOYNTON, bankrupt.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

At ——, on the — day of ——, A. D. 18—.

To Mr. —— ——, of ——, in the county of —— and State of ——, creditor of —— ——, said bankrupt:

SIR: You are hereby notified that a warrant in bankruptcy has just been issued out of the district court of the United States for the northern district of Illinois against the estate of Charles W. Boynton, of Chicago, in the county of Cook, in said district, who has been adjudged a bankrupt upon his own petition; that the payment of any debts and the delivery of any property belonging to said bankrupt to him or for his use and the transfer of any property by him are forbidden by law; that a meeting of the creditors of said bankrupt, to wit:

32 "EXHIBIT C"—(Continued).

Creditors.	Places of residence.	Amount of debt.
		Dolls. Cts.
Secured.		
Mrs. Phœbe Carter	Chicago	2,700
H. B. Lewis	"	150
Augustus Cavana	"	3,000
Benjamin Ratch	Boston, Mass.	
Unsecured.		
Julius Jonas	Chicago	400
H. W. Rogers, Jr., & Bro.	"	500
Northwest Malt Co.	"	250
Cooley & Dwight	"	400
G. P. Adams	"	400
Wallace & Henderson	"	400
Underwood & Co.	"	400
W. A. Spearson	Wheaton	100
W. N. Sturges	Chicago	200
W. P. Dickinson	"	600
Kimball & Frake	"	150
A. G. Beebe	"	25
Geo. Ellison	"	200
Prentice & Hook	"	500
Geo. Hulbert	"	200
P. H. Ball	Erie, Pa.	6,423
Preferred.		
Collector of taxes	Chicago	Unknown.

33 "EXHIBIT C"—Continued.

to prove their debts and to choose one or more assignees of his estate, will be held at a court of bankruptcy to be holden on the 28th day of September, A. D. 1878, at 10 o'clock a. m., at the office of H. N. Hibbard, No. 159 La Salle St., in the city of Chicago, before Homer N. Hibbard, Esquire, register in bankruptcy of said district.

JESSE S. HILDRUP,
U. S. Marshal for said District.

And have you then and there this warranty, with your doings thereon.

Witness the Hon. Henry W. Blodgett, judge of the said district

court, and the seal thereof, at Chicago, in *in* said district, on the 28th day of August, A. D. 1878.

[L. S. of the Court.]

WM. H. BRADLEY,
Clerk of District Court U. S. for said District.

Countersigned.
H. N. HIBBARD,
Register of said District.

Return of Marshal.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

By virtue of the foregoing warrant I have caused the notice therein ordered to be published by advertisement 3 times in the newspapers therein mentioned. The first publication thereof was on the 30th day of August, A. D. 1878, in the Chicago Daily Inter-Ocean and Daily Evening Journal. And I also, on the 2nd day of September, A. D. 1878, sent by mail or served personally upon the creditors named in said warrant a copy of the notice required thereby to be sent to or served on them, and all of the said notices were according to the direction set out in said warrant.

34 "EXHIBIT C"—Continued.

Fees and Expenses.

1. Service of warrant	$2 00
2. Necessary travel, at the rate of five cents a mile each way	10 00
3. Notice to creditors, ten cents each	2 40
4. Actual expenses in publishing notices as follows:	
Preparing and printing	3 36
Postage and envelopes	1 44
5. Actual expenses in custody of property and other services as follows:	
Oath	25
	$19 45

JESSE S. HILDRUP,
U. S. Marshal for said District, as Messenger,
By M. A. WHEELER, *Dep'ty.*

Affidavits as to Expenses.

UNITED STATES OF AMERICA, }
Northern District of Illinois, } *ss:*

On this 3rd day of September, A. D. 1878, personally appeared the said M. A. Wheeler, deputy messenger, and made oath that the above expenses returned by him under number — have been actually incurred and paid by him and are just and reasonable.

[SEAL.] JAMES H. PADDOCK,
Notary Public.

(Endorsed:) Filed this 23rd day of December, A. D. 1880. Wm. H. Bradley, clerk of said district court U. S. Filed in my office Sept. 11, 1878. H. N. Hibbard, register in bankruptcy.

"EXHIBIT D."

District Court of the United States, Northern District of Illinois.

35 Whereas Charles W. Boynton, of Chicago, in the county of Cook, in said district, has been duly adjudged a bankrupt under the Revised Statutes of the United States, title "Bankruptcy," and appears to have conformed to all the requirements of law in that behalf, it is therefore ordered by the court that said Charles W. Boynton be forever discharged from all debts and claims which by said title are made provable against his estate and which existed on the fifteenth day of April, A. D. eighteen hundred and seventy-eight, on which day the petition for adjudication was filed by him, Charles W. Boynton, excepting such debts, if any, as are by law excepted from the operation of a discharge in bankruptcy.

Given under my hand and the seal of said court, at Chicago, in the said district, this twenty-third day of December, A. D. eighteen hundred and eighty.

H. W. BLODGETT, *Judge.*

[SEAL.] WM. H. BRADLEY, *Clerk.*

NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the district court of the United States for said northern district of Illinois, do hereby certify the above and foregoing to be true, correct, and complete copy of the petition for adjudication and of schedule A 3 thereto attached, the warrant to marshal as messenger, and of the discharge issued to Charles W. Boynton in the matter of Charles W. Boynton, bankrupt, in bankruptcy, as appears from the record and originals now in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office in Chicago, in said district, this 19th day of March A. D. 1881.

[SEAL.] WM. H. BRADDEY, *Clerk.*

36 The affidavit of Thomas Bates, filed in said court March 25th, 1881, in support of said motion for stay of execution and hereinbefore in said record entry mentioned, is in words and figures following, to wit:

STATE OF ILLINOIS, } *ss:*
Stephenson County, }

In the Circuit Court of Stephenson County.

PLOWDEN H. BALL *et al. vs.* CHARLES W. BOYNTON.

STATE OF ILLINOIS, } *ss:*
Cook County, }

Thomas Bates, being first duly sworn, deposes and says that he

was one of the attorneys of Charles W. Boynton, in bankruptcy, and that on or about the 18th day of April, A. D. 1879, said Boynton told this affiant that the above-mentioned suit was pending against him in the circuit court of Stephenson county; that the original judgment or decree had been obtained against him in the said case quite a number of years before, but that the proceedings that were then pending, as he understood, were taken for the purpose of reviving or renewing the judgment, and said Boynton asked affiant if it was necessary to do anything in regard to the matter.

Affiant further swears that he told Boynton that it would be advisable to send a certified copy of his adjudication in bankruptcy to Freeport and have it presented to this court and ask for a stay of proceedings in the case.

Affiant further swears that, pursuant to said Boynton's request, he procured a certified copy of adjudication and gave it to said
37 Boynton, and that he (said Boynton) afterward told affiant that he had sent said certified copy to his brother in Freeport, with instruction to take it to Mr. Hyde, or some other attorney, and ask him to make the motion for stay of proceedings. Affiant further swears that both he and said Boynton supposed that it was done, and affiant did not know to the contrary until during the month of December, 1880, when he heard that said Boynton's brother had neglected to have the certified copy presented to this court, and the judgment in said cause had been revived. Affiant further swears that the original judgment or decree in the said case was, as shown by the records, obtained before said Boynton filed his petition in bankruptcy; that it was a provable debt against his estate in bankruptcy and was scheduled in bankruptcy, as shown by his petition and schedules filed in the United States district court for the northern district of Illinois. Affiant further swears that the return of the marshal of the United States district court for the northern district of Illinois shows that service of notice of said Boynton's petition in bankruptcy was served upon P. H. Ball, the plaintiff in said suit, according to law; and affiant says that during the month of December, A. D. 1880, the said Boynton received his discharge in bankruptcy from said United States court, but affiant swears that said discharge was not received in time to be plead in this case.

THOMAS BATES.

Subscribed and sworn to before me this 17th day of March, A. D. 1881.

[SEAL.] EDWARD R. SWETT,
Notary Public.

The Affidavit of John Ling. Filed in said Circuit Court March
38 *25th*, 1881.

STATE OF ILLINOIS, }
Stephenson County, } *ss:*

In the Stephenson County Circuit Court.

P. H. BALL *et al. vs.* CHARLES W. BOYNTON.

STATE OF ILLINOIS, }
Cook County, } *ss:*

John Ling, being first duly sworn, deposes and says that he is an attorney-at-law at Chicago, Illinois, and that, pending the proceedings in bankruptcy of Charles W. Boynton, the defendant in this cause, he was waited upon at his office by Mr. J. A. Crain, who represented to this affiant that he was attorney of plaintiff and desired that objection might be filed to defendant's discharge in bankruptcy on account of the plaintiff in this suit. Affiant further swears that he was afterward approached by other parties, who claimed they represented P. H. Ball in regard to filing objections to defendant's discharge, and that all the interviews were had with said parties before said Boynton received his discharge from bankruptcy.

JOHN LING.

Subscribed and sworn to before me this 14th day of March, A. D. 1881.

[SEAL.] EDWARD R. SWETT,
Notary Public.

And thereupon the court made and entered of record the
39 following order in said cause, to wit:

In the Circuit Court of Stephenson County, Illinois, of the March [Term], A. D. 1881.

PLOWDEN H. BALL, as Survivor of Edgar F. Griffin, Deceased, }
vs. } 62.
CHARLES W. BOYNTON. }

Judgment *vs.* defendant at the December term, A. D. 1879, for $6,223.99 debt and for $5,234.99 damages and costs.

And now, on this day, came on to be heard by the court the motion of the defendant in the above-entitled judgment for a perpetual stay of execution on said judgment, and the court having heard read said motion and the affidavits therewith presented by said defendant, and it appearing to the court from the notice filed herein and the affidavit of service of said notice that said plaintiff, Plowden H. Ball, has had due notice of said motion, it is ordered by the court that said Plowden H. Ball, plaintiff in said judgment, show cause, by the coming in of said court on the morning of April 12th, 1881, why said motion should not be granted and execution be, by order of this court, perpetually stayed on said judgment.

WILLIAM BROWN, *Judge.*

And afterwards, to wit, on the 12th day of April, A. D. 1881, the same being one of the days of the said March term of said court, the said plaintiff appeared in said cause by J. A. Crain, his attorney, and filed the following affidavit:

A copy of which affidavit and exhibit is in words and figures following, to wit:

40 *Motion for Perpetual Stay of Execution.*

In the Stephenson County Circuit Court, of the March Term, A. D. 1881.

PLOWDEN H. BALL, as Survivor of Edgar F. Griffin, Deceased, } *vs.* } 62.
CHARLES W. BOYNTON.

Joseph A. Crain, of lawful age, of said county, being first duly sworn, on his oath says that at the September term, A. D. 1865, of the circuit court of Stephenson county, a decree was passed in a certain cause then depending in said court on the chancery side thereof, wherein the said Plowden H. Ball and one Edgar F. Griffin were complainants and said Charles W. Boynton and others were defendants, a duly certified copy of which decree is hereunto annexed, marked Exhibit "A," and made a part of this affidavit, which decree is the same decree, and none other, mentioned and referred to in the first paragraph of said Charles W. Boynton's affidavit in this proceeding now here made and filed.

That after the passing and entry of said decree the said Edgar F. Griffin departed this life, leaving him surviving the said Plowden H. Ball, and that afterwards, no execution having been issued on said decree against said Charles W. Boynton and said decree having become dormant, an action of debt on said decree was by said Plowden H. Ball, as survivor of said Edgar F. Griffin, brought against said Charles W. Boynton in the circuit court of said Stephenson county, to the September term thereof, A. D. 1877, and summons served on said Charles W. Boynton in said suit more than ten days before said September term, 1877, of said Stephenson county circuit —; and afterwards, at the March term, A. D. 1878, such proceedings were had and entered of record in said cause that the plaintiff in said suit came by his attorney, and said defendant came by his attorney, J. I. Neff, then and now an attorney of said court,
41 and a rule on said defendant was taken to plead by the then next Monday morning.

And afterwards, on the 4th day of April, said defendant, by his said attorney, filed his plea of *nil debit*, upon which said plaintiff took issue; that after said Charles W. Boynton, on the 15th day of April, 1878, had filed his petition in bankruptcy, as is alleged in his said affidavit herein filed, and was that same day adjudicated a bankrupt, although said Charles W. Boynton resided in Chicago, in the State of Illinois, and said circuit court wherein was pending said suit on said decree was held in the court-house, in the city of Freeport, in said Stephenson county, distant from said residence of

said Charles W. Boynton about the distance, by easy daily railway travel, [of] one hundred [and] twenty-one miles, and between which places there was daily mail and continued hourly and less telegraphic communication, yet said Charles W. Boynton, after having been so adjudicated bankrupt, took no steps whatever to stay said suit on said decree other than he has set forth, if the same be truly set forth, for a period of over nineteen months before the hereinafter-mentioned judgment was rendered, but saw fit to entirely depend on his said brother, Jerome Boynton, who was then and now is a resident of said city of Freeport.

That afterwards, to wit, on the 9th day of December, A. D. 1879, at the December term, A. D. 1879, of the circuit court of said Stephenson county, in said last-mentioned suit, certain proceedings were *held* and entered of record whereby judgment was rendered, a copy of which record is in the words and figures following, to wit:

In the Stephenson County Circuit Court, of the December Term, A. D. 1879.

42 PLOWDEN H. BALL, as Survivor of Edgar F. Griffin, Deceased, Plaintiff,

vs.

CHARLES W. BOYNTON, Defendant.

And now on this day comes here into court the said plaintiff, by J. A. Crain, his attorney, and the said defendant, by James I. Neff, his attorney, and a jury having been heretofore by the parties hereto waived and the issues herein submitted to the court for trial thereof and said cause now here been called for trial upon the issues joined, and the court, having now heard the evidence adduced, does now here find said issues for the plaintiff, and that said defendant is indebted to said plaintiff in the sum of six thousand two hundred twenty-three $\frac{99}{100}$ dollars, debt, and that said plaintiff's damages by reason of the non-payment of said debt are the sum of five thousand two hundred thirty-four $\frac{99}{100}$ dollars.

Wherefore it is now here by the court considered that said plaintiff have and recover of said defendant his said debt of six thousand two hundred twenty-three $\frac{99}{100}$ dollars, together with his, said plaintiff's, damages, assessed at said sum of five thousand two hundred thirty-four $\frac{99}{100}$ dollars, and his costs in this case; and that said plaintiff have his execution for said debt and for said damages, together with his said costs.

JOHN V. EUSTACE, *Judge.*

Which judgment so rendered and entered in said last-mentioned suit at law in said circuit court of Stephenson county
43 is the same proceeding in said affidavit of said Charles W. Boynton mentioned and referred to and styled as "steps to revive said decree" and "proceedings to revive said decree or judgment" and "proceedings in said revival."

And this affiant further says that on the 21st day of February, A. D. 1880, said Plowden H. Ball, as survivor aforesaid, sued out

his execution on said judgment, which execution was afterwards, on the 20th day of May, A. D. 1880, returned unsatisfied and unpaid, and that no other or further execution has been since sued out thereon.

And this affiant further says that said original indebtedness of said Charles W. Boynton as fixed and established by said decree was created while acting in and as to the complainants therein — was and remains of a fiduciary character; and while the same might have been provable for the purpose of receiving a dividend thereon, had there been any, yet that said debt, as the same existed originally and as the same afterwards became evidenced and established by said decree, was in truth, fact, and law and is excepted from the effect of the said supposed discharge of the said Charles W. Boynton.

This affiant further says that he became the attorney of said Plowden H. Ball after the passing of said original decree and death of said Edgar F. Griffin.

J. A. CRAIN.

Subscribed & sworn to before me this 12th day of April, A. D. 1881.

D. S. BREWSTER, *Clerk.*

EXHIBIT A.

In the Circuit Court of Stephenson County, Illinois, of the
41 September Term, A. D. 1865. In Chancery.

PLOWDEN H. BALL and EDGAR F. GRIFFIN
vs.
JENNIE BOYNTON, Widow, & FREDERICK S. & CLARA BOYNTON, Heirs-at-Law, of Stewart G. Boynton, Deceased; Theophilus K. Greenwood, Administrator of the Estate of Stewart G. Boynton, Deceased; Wallace W. Boynton, Charles W. Boynton, and Jerome C. Boynton.

STATE OF ILLINOIS, *Stephenson County:*

This cause having been brought to a hearing and heard upon the bill taken as confessed against the said Jennie Boynton, and upon bill, answers, and replications as to all the other defendants above named, and the court having heard the evidence and arguments of counsel for the respective partses, it appears to the court, from the evidence and pleadings in the cause, that the complainants herein recovered a judgment against the said Stewart G. and Wallace W. Boynton, as stated in said bill of complaint, and that execution upon the said judgment was issued and returned unsatisfied, as in said bill is stated, and that there was due from the said Stewart G. and Wallace W. Boynton to the complainants herein at the time of the filing of the bill herein on said judgment the sum of six thousand one hundred and twenty-two dollars and sixty-one cents, and sixty-one dollars and twenty-two cents interest thereon from the 6th
45 day of October, A. D. 1859, the time of its rendition, to the sixth day of December, A. D. 1859; and it appears to the court from

the evidence that the said principal and interest was then and is now due and unpaid from the said Stewart G. & Wallace W. Boynton to the said complainants, and also that the said judgment has not been paid, and that it is now in full force and entirely unsatisfied, and that the said judgment and interest thereon from the rendition thereof to the present time is entirely unpaid and unsatisfied.

And it further appearing to the court from the evidence that the said Stewart G. Boynton, in the fall of A. D. 1851, advanced to and furnished the said Charles W. Boynton fifteen hundred dollars in money for the purpose of purchasing land in the county of Fayette, in this State, and that the said Charles W. Boynton, with said fifteen hundred dollars so advanced to him by the said Stewart G. Boynton, purchased, in connection with one Joel A. Park, eleven hundred and eighty-four acres of timber land in said county of Fayette, in this State, and that said land was entered in the name of the said Charles W. Boynton and the said Joel A. Park, and that the said Joel A. Park and the said Charles W. Boynton held the legal title to said land, and that the said Charles W. Boynton held the legal title to one-half of the said land—that is to say, in five hundred and ninety-two acres of the said land—and that that portion of said land of which the said Charles W. Boynton held the legal title was purchased with the said fifteen hundred [dollars] so as aforesaid furnished and advanced to him by the said Stewart G. Boynton; and it further appearing to the court that the said Charles W. Boynton was to have an interest in the said land for locating and entering the same, and no more, and that the balance of the interest in the said land was in the said Stewart G. Boynton, he having furnished the
46 money to enter the same: and it further appearing to the court that the said Charles W. Boynton had and held the legal title to the said land until the 20th day of November, A. D. 1859, and that, on the last-named day, the said Stewart G. Boynton had and owned all the real interest in the said land of which the said Charles W. Boynton held the legal title, except of the legal interest of the said Charles W. Boynton had in the same for locating and entering the same.

And it further appearing to the court from the evidence that the said Charles W. Boynton, about the 20th day of November, A. D. 1859, purchased a large stock of goods of one Joseph R. Shelley, in the city of Freeport, Illinois, for the sum of fifteen thousand dollars, and that in part payment for said goods the said Charles W. Boynton conveyed to the said Joseph R. Shelley the said land at eleven dollars per acre, and that the said Joseph R. Shelley received from the said Charles W. Boynton said conveyance of said land in part payment of said goods at eleven dollars per acre; and it further appearing to the court from the evidence that at the time the said lands were conveyed by the said Charles W. Boynton to the said Joseph R. Shelley as aforesaid the said Stewart G. Boynton had and held an interest in the said lands to the amount of four thousand six hundred and twelve dollars and seven cents, and that the said Charles W. Boynton had an interest in the said lands for services in locating and entering the same to the amount of one thousand

eight hundred and ninety-nine dollars, being one-fourth of the value and one-half of the difference between one-fourth and one-third of the value of the said land at the sum of eleven dollars per acre; and it further appearing to the court from the evidence that the said Charles W. Boynton has still in his hands the interest
47 of the said Stewart G. Boynton arising from the avails on the exchange of the said lands with the said Shelley for the said goods, and that said avails amounted on the said exchange on the 20th day of November, 1859, to the said sum of four thousand six hundred and twelve dollars and forty-seven cents, and that the said Charles W. Boynton has not in any manner accounted for the same, and that he, the said Charles W. Boynton, has the same still in his hands; and it appearing from the evidence that the said Charles W. Boynton has not and ought of right to account to the complainants herein for the said sum of four thousand six hundred and twelve and $\frac{47}{100}$ dollars, with interest thereon from the 20th day of November, A. D. 1859, to the present time, and that the interest on the last-named sum from the 20th day of November, A. D. 1859, to the 20th day of September, A. D. 1865, amounts to the sum of sixteen hundred and ten and $\frac{52}{100}$ dollars:

It is therefore ordered, adjudged, and decreed, and the court does hereby order, adjudge, and decree, that the said Charles W. Boynton pay to the complainant herein the said sum of four thousand six hundred and twelve and $\frac{47}{100}$ dollars, with interest thereon from the 20th day of November, A. D. 1859, to the 20th day of September, A. D. 1865, making, including principal and interest, six thousand two hundred and twenty-three and $\frac{99}{100}$ dollars, and that the complainants herein have execution therefor, and also, in addition thereto, three-fourths costs of this suit, and that complainants have execution therefor; and it appearing to the court from the evidence that the said Stewart G. & Wallace W. Boynton, on or about the 27th day of June, A. D. 1859, conveyed, by way of chattel mortgage, a certain warehouse, furniture, and fixtures to the said defendant, Jerome C. Boynton, under the fraudulent pretext of securing
48 to the said Jerome C. Boynton a note, of the same date, made by them to him, of one thousand dollars; and it appearing to the court from the evidence that, on or about the 29th day of June, A. D. 1859, the said Stewart G. & Wallace W. Boynton assigned to the said Jerome C. Boynton their interest in a certain contract for the conveyance of certain lands in Stephenson county mentioned in it from the Illinois Central Railroad Company to Snyder & Stevens, offered in evidence in this cause, and which came to them, the said Stewart G. & Wallace W., by assignment, for a consideration, as appears upon the face of said assignment, of three hundred dollars, and, at or about the same time, the said Stewart G. & Wallace W. Boynton assigned and transferred to the said Jerome C. Boynton a certain debt of about one thousand dollars from S. W. & James McKees to them, and also a lease of two hundred and forty acres of land in Stephenson county, Illinois; and it further appearing to the court from the evidence that the making and delivery of the said chattel mortgage and note, and the endorsement thereon as aforesaid, and

the said assignment of the said contract from the Illinois Central Railroad Company, and the assignment of the said debt of the said McKees, and the said lease from the said Stewart G. & Wallace W. Boynton to the said Jerome C. Boynton were all and every of them fraudulent and void as to the complainants herein; and it further appearing to the court from the evidence that the said contract with the Illinois Central Railroad Company offered in evidence—that is to say, the interest in the said contract obtained by the said Jerome C. Boynton from Stewart G. & Wallace W. Boynton—was, in November, 1860, surrendered up to the Illinois Central Railroad Company by Jerome C. Boynton and by it cancelled at his instance, and that the interest in said contract which the said Jerome C. Boynton had obtained from the said Stewart G. & Wallace W. Boynton was,
49 at the time he so surrendered it to the said railroad company and caused it to be cancelled, worth eight hundred dollars, and that, by the procurement of the said Jerome C. Boynton, the said railroad company has conveyed away said lands mentioned in said contract to other parties; and it further appearing to the court from the evidence that the said Jerome C. Boynton has now in his hands the avails of said property, and for his liability on account thereof and his dealings in respect thereto, to the amount of one thousand and fifty dollars, which the said Jerome C. Boynton ought to account for and pay over to the complainants herein, they hereby relinquishing all claim to all of said property itself:

It is therefore ordered, adjudged, and decreed, and the court orders, adjudges, and decrees, that the said Jerome C. Boynton pay to the complainants herein the sum of one thousand and fifty dollars and one-fourth of the costs in this suit, and that the complainants have execution therefor; and it further appearing to the court from the evidence that the complainants herein are entitled to the rents of the farm in Stephenson county, being the same lands embraced in the said contract with the Illinois Central Railroad Company for the year A. D. 1860 mentioned in the evidence, which are now in the hands of the receiver in this cause, which rents amount in all to the sum of eight hundred and thirty-six dollars and twenty-seven cents, the same to be applied and credited on the said judgment against Stewart G. & Wallace W. Boynton on the 1st October, A. D. 1860: It is therefore further ordered, adjudged, and decreed that the receiver herein pay said rents to complainants herein.

BENJ. R. SHELDON.

50 STATE OF ILLINOIS, } ss:
Stephenson County, }

I, Daniel S. Brewster, clerk of the circuit court in and for said county of Stephenson, do hereby certify that the above and foregoing is a true copy of a certain decree as the same has been heretofore passed and entered of record in said court in a certain cause lately depending therein, wherein one Plowden H. Ball and Edgar F. Griffin were complainants, and Jennie Boynton, widow, and Frederick S. & Clara Boynton, heirs-at-law, of Stewart G. Boynton, deceased; Theophilus K. Greenwood, administrator of the estate of

Stewart G. Boynton, deceased; Wallace W. Boynton, Charles W. Boynton, and Jerome C. Boynton were defendants, as appears of and by the record of said court in my said office now remaining.

In witness whereof I have, at the city of Freeport, in said county, hereunto set my hand and affixed the seal of said court this 11th day of April, A. D. 1881.

[SEAL.] DANIEL S. BREWSTER, *Clerk.*

And plaintiff also introduced in evidence a certified copy of a certain decree (which decree is attached to the said affidavit of T. A. Crain and marked Exhibit "A"), and which decree it is hereby by the parties hereto admitted was passed and entered upon a certain creditor's bill theretofore filed in said Stephenson — circuit court by said Plowden H. Ball and Edgar F. Griffin, and against Stewart G. Boynton and Wallace W. Boynton, they being the only original judgment defendants against whom the original judgment was obtained, upon which said creditors' bill was filed making said Charles
51 W. Boynton and others defendants, said Stewart G. having died during the pendency of said creditors' bill, and his administrator and heirs having been substituted for him and made parties thereto for him in said proceeding, and the court having jurisdiction of all said defendants against whom said decree was passed and entered.

Said plaintiff also introduced in evidence the record of the judgment in this case entered on the 9th day of December, 1879, as shown by the record hereinbefore set forth, which was all the evidence offered by either party on the hearing of said motion or in said cause.

And afterwards, on the 22nd day of April, A. D. 1881, the same being one of the days of the said March term of said court, the said court made and entered of record in said cause the following order:

(*Order.*)

In the Circuit Court of Stephenson County, Illinois, of the March Term, A. D. 1881.

PLOWDEN H. BALL, as Survivor of Edgar F. Griffin, Deceased,
vs.
CHARLES W. BOYNTON.

And now on this day coming on to be heard the motion of said defendant, Charles W. Boynton, for a perpetul stay of execution upon the judgment rendered in the above-entitled cause, and the court having made and entered an order in said cause on the 29th day of March, 1881, upon said plaintiff to show cause by the 12th day of April, 1881, why said motion should not be granted, and said plaintiff, by J. A. Crain, his attorney, having appeared and filed the affidavit of said Crain, and adduced evidence herein in
52 response to said order to show cause, and said parties, plaintiff and defendant, appearing by their respective attorneys, and the court having heard said motion and the proofs therewith

offered by the said parties as well as the arguments of counsel, and being fully advised, it is ordered by the court that said motion be denied; and it is further considered and ordered that said plaintiff, Plowden H. Ball, as survivor of said Edgar F. Griffin, deceased, have and recover of said Charles W. Boynton, defendant, his, said plaintiff's, costs in this behalf, to be taxed by the clerk of this court, and that said plaintiff have his execution therefor.

And thereupon said defendant prays an appeal from said order herein to the appellate court, which is allowed on the defendant's filing a bond to the plaintiff properly conditioned, in the penal sum of $200, with surety to be approved by the clerk of this court, within 20 days from this date. It is further ordered that 20 days be allowed in which to settle bill of exceptions herein.

WILLIAM BROWN, *Judge.*

And, inasmuch as the matters and things aforesaid do not appear of record, the said Charles W. Boynton now here tenders this his bill of exceptions and prays that the same be allowed and signed and sealed by the court. Whereupon it is done accordingly.

WILLIAM BROWN, [SEAL.]
Judge 13th Jud'l Circuit.

Hon. Wm. Brown, judge:

I am satisfied with the above and foregoing bill of exceptions.

Freeport, 26 April, 1881.

53 J. A. CRAIN,
Plaintiff's Att'y.

And be it remembered that heretofore, to wit, on the 26th day of April, 1881, in vacation after said March term, A. D. 1881, of said court, the said defendant, Charles W. Boynton, filed an appeal bond herein, which appeal bond is in the words and figures following, to wit:

Know all men by these presents that we, Charles W. Boynton, of the county of Cook and State of Illinois, and Jerome C. Boynton, of the county of Stephenson and State of Illinois, are held and firmly bound unto Plowden H. Ball, as survivor of Edgar F. Griffin, deceased, of the county of Erie, State of Pennsylvania, in the penal sum of two hundred (200) dollars, lawful money of the United States; for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly, severally, and firmly, by these presents.

Witness our hands and seals this 26th day of April, A. D. 1881.

The condition of the above obligation is such that whereas the said Plowden H. Ball did, on the 9th day of December, A. D, 1879, in the circuit court of Stephenson county, in the State aforesaid, and of the December term thereof, A. D. 1879, recover judgment against the above-bounden Charles W. Boynton for the sum of eleven thousand four hundred fifty-eight dollars and ninety-eight cents, besides costs of suit; and whereas, the said Charles W. Boynton did, on the 25th day of March, A. D. 1881, move that execution on said judgment be perpetually stayed, which motion was denied by the

court, from which said judgment of the said circuit court of Stephenson county, denying the said motion, the said Boynton has
54 prayed for and obtained an appeal to the appellate court of said State:

Now, therefore, if the said Charles W. Boynton shall duly prosecute his said appeal with effect, and, moreover, pay the costs in case the said judgment denying the said motion shall be affirmed in said appellate court, then the above obligation to be void; otherwise to remain in full force and virtue.

CHARLES W. BOYNTON. [SEAL.]
JEROME C. BOYNTON. [SEAL.]

55 STATE OF ILLINOIS, } ss:
County of Stephenson, }

I, Daniel S. Brewster, clerk of the circuit court of Stephenson county, in the State aforesaid, do hereby certify the above and foregoing to be a true, perfect, and complete transcript of all pleadings, all proceedings, and final judgment as the same remains of record in my office in a certain cause lately pending in said court, on the common law side thereof, wherein Plowden H. Ball, as survivor of Edgar F. Griffin, was plaintiff, and Charles W. Boynton defendant.

In witness whereof, I have hereunto set my hand and affixed the seal of said court, at Freeport, this twenty-eighth day of April, A. D. 1881.

[Circuit Court Seal.]

DANIEL S. BREWSTER, *Clerk.*

STATE OF ILLINOIS, } ss:
Fourteenth Judicial Circuit, }

I, —— ——, judge of the circuit court of Stephenson county, in said judicial circuit, in the State aforesaid, do hereby certify that I am sole presiding judge of said court; that I am well acquainted with the handwriting of clerk of said court; that the signature to the above attestation is genuine and in his handwriting; and that said attestation is in due form.

—— ——

Judge of Fourteenth Judicial Circuit, Illinois.

56 STATE OF ILLINOIS, } ss:
Second Appellate Court District, }

I, James R. Combs, clerk of the appellate court in and for the said district of said State, do hereby certify the annexed to be the original transcript of the record and proceedings of the circuit court of Stephenson county in the case of Charles W. Boynton, appellant, *vs.* Plowden H. Ball, survivor, &c., appellee, as the same was filed in my said office on the eighteenth day of May, A. D. 1881.

In testimony whereof I hereunto subscribe my name and affix the seal of said court at the city of Ottawa, in said State, this twenty-third

day of February, in the year of our Lord one thousand eight hundred and eighty-two.

[APPELLALE COURT SEAL.] J. R. COMBS,
Clerk of the Appellate Court.

Endorsed: Filed Feb. 23, 1882. E. F. Dutton, clerk.

57 UNITED STATES OF AMERICA, } ss:
State of Illinois, Second District, }

At a term of the appellate court begun and held at Ottawa on Tuesday, the seventeenth day of May, in the year of our Lord one thousand eight hundred and eighty-one, within and for the second district of the State of Illinois.

Present: Hon. —— ——, presiding justice; Nathaniel J. Pillsbury, justice; Lyman Lacy, justice; James R. Combs, clerk; Thomas Clark, sheriff.

Be it remembered that afterwards, to wit, on the 25th day of May, A. D. 1881 (the same being one of the days of said term), certain proceedings were had and orders made and entered of record by said court, among which are the following, viz:

Appeal from Stephenson —.

CHARLES W. BOYNTON
vs. } No. 640.
PLOWDEN H. BALL, Survivor of Edgar F. Griffin, Deceased.

Now, on this day, this cause comes on for hearing on the call of the docket, and it appearing to the court that a duly certified transcript of the record and proceedings of the court below herein, together with abstracts thereof and brief and argument of counsel in support of the errors assigned, have been duly filed herein as required by law and the rules of this court in that behalf made out and provided, and that this cause is here submitted upon such transcript, assignment of errors, abstracts, and briefs, together with oral argu-
58 ments by Leonard Swett, on behalf of said appellant, and J. A. Crain, on behalf of said appellee, for the consideration and judgment of the court, therefore it is ordered by the court that this cause be, and the same hereby is, taken under advisement.

Be it remembered that afterwards, to wit, on the second day of November, A. D. 1881 (the same being in vacation after said term), certain orders were made and entered of record by said court, among which is the following, viz:

Appeal from Stephenson —.

CHARLES W. BOYNTON
vs. } No. 640.
PLOWDEN H. BALL, Survivor of Edgar F. Griffin, Deceased.

On this day came again the said parties, and the court, having diligently examined and inspected as well the record and proceed-

ings aforesaid as the matters and things therein assigned for error, and being now sufficiently advised of and concerning the premises, finds that neither in the record and proceedings aforesaid nor in the rendition of the judgment aforesaid is there anything erroneous, vicious, or defective, and that in said record there is no error.

Therefore it is considered by the court that the judgment aforesaid be affirmed in all things and stand in full force and effect, notwithstanding the said matters and things therein assigned for error.

And it is further considered by the court that the said appellee recover of and from the said appellant his costs by him in this behalf expended, to be taxed, and that he have execution therefor.

59 And afterwards, to wit, on the 16th day of November, A. D. 1881, there was filed in the office of the clerk of said court a certain petition for appeal to the supreme court of the State in the words and figures following, to wit:

Appeal from Circuit Court of Stephenson County.

In the Appellate Court for the Second District of Illinois.

CHARLES W. BOYNTON *vs.* PLOWDEN H. BALL.

The judgment of the court below having by said appellate court for the second district of Illinois been affirmed, now comes the said appellant, by Swett, Bates and Haskell, his attorneys, and moves the said appellate court for an appeal to the supreme court of Illinois, and for grounds of said motion would show that the amount in controversy in said suit exceeds one thousand dollars.

November 8, 1881.

SWETT, BATES & HASKELL,
Att'ys for Appellant.

And be it remembered that, to wit, on said 16th day of November, there was also filed and entered of record in the said clerk's office an order of Hon. N. J. Pillsbury, one of the justices of said court, granting such appeal, which said order is in the words and figures following, to wit:

Appeal from the Circuit Court of Stephenson County.

60 In the Appellate Court for the Second District of Illinois.

CHARLES W. BOYNTON *vs.* PLOWDEN H. BALL.

The appellant having this day prayed an appeal in said case to the supreme court, and said motion for said appeal having come on to be heard, and it appearing to the court that the amount in controversy in said suit exceeds the sum of one thousand dollars, it is therefore ordered that said appellant be allowed and granted an appeal to said supreme court of Illinois upon filing with the clerk of said appellate court a bond in the penal sum of two hundred and fifty dollars, said bond to be approved by said appellate court or one

of the justices thereof; said bond to be filed within thirty days from the date of this order.

Dated November 8th, A. D. 1881.

N. J. PILLSBURY,
One of the Judges of said Appellate Court.

And be it also remembered that, to wit, on the 16th day of November, A. D. 1881, the bond of said Charles W. Boynton, in compliance with the order aforesaid, was filed in the office of the clerk of said court, and is in the words and figures following, viz:

Know all men [by] these presents that we, Charles W. Boynton, of the city of Chicago, Cook county, Illinois, and Jerome C. Boynton, of the city of Freeport, of the county of Stephenson and State of Illinois, are held and firmly bound unto Plowden H. Ball, of
61 Erie, Pa., in the penal sum of two hundred and fifty dollars, lawful money of the United States, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly, severally, and firmly, by these presents.

Witness our hands and seals this tenth day of November, A. D. 1881.

The condition of the above obligation is such that whereas the said Plowden H. Ball did, on the ninth day of December, A. D. 1879, in the circuit court of Stephenson county, in the State aforesaid, and of December term thereof, A. D. 1879, recover a judgment against the said Charles W. Boynton for the sum of eleven thousand four hundred and fifty-eight dollars and ninety-eight cents, besides costs of suit, from which said judgment of the circuit court of Stephenson county the said Charles W. Boynton prayed for and obtained an appeal to the appellate court within and for the second district of said State; and whereas the said appellate court did, on the second day of November, A. D. 1881, and at the June term thereof, A. D. 1881, affirm the judgment of the Stephenson circuit court aforesaid and did render judgment against the above bounden for costs of suit, from which order of affirmance and judgement of the said appellate court the said Chas. W. Boynton has prayed for and obtained an appeal to the supreme court of the State of Illinois:

Now, therefore, if the said Charles W. Boynton shall duly prosecute his said appeal with effect and, moreover, pay the amount of the judgment, costs, interest, and damages rendered and to be rendered against him in case the said judgement shall be affirmed in said supreme court, then the above obligation to be void; otherwise to remain in full force and virtue.

62 CHARLES W. BOYNTON. [SEAL.]
J. C. BOYNTON. [SEAL.]

(Endorsed as follows:) Approved and ordered filed Nov. 14, A. D. 1881. N. J. Pillsbury, one of the judges appellate court. Filed Nov. 16th, 1881. J. R. Combs, clerk.

63 STATE OF ILLINOIS, }
Second District, } *ss:*

I, James R. Combs, clerk of the appellate court in and for said district, of the State of Illinois, and keeper of the records and seal thereof, do hereby certify that the foregoing is a true copy of the record and proceedings of the said appellate court in the above-entitled cause of record in my office.

In testimony whereof I hereunto set my hand and affix the seal of the said appellate court, at Ottawa, this 27th day of January, in the year of our Lord one thousand eight hundred and eighty-two.

[Appellate Court Seal.]

J. R. COMBS,
Clerk of the Appellate Court.

63½ *Assignment of Errors.*

CHARLES W. BOYNTON, Appellant,
vs.
PLOWDEN H. BALL, Appellee.

The circuit court of Stephenson county erred in denying and overruling appellant's motion for a perpetual stay of the execution in said cause, and the appellate court for the second district of Illinois erred in sustaining and affirming the judgment of the court below in overruling said motion for a perpetual stay of the execution in said cause.

SWETT, BATES & HASKELL,
Attorneys for Appellant.

Endorsed: Filed Feb. 23, 1882. E. F. Dutton, clerk.

64 And afterwards, to wit, on the 11th day of March, 1882, the same being one of the days of the March term, 1882, of said court, the following proceedings *was* had and entered of record in said cause, to wit:

Appeal 2d Dist.

CHARLES W. BOYNTON *v.* PLOWDEN H. BALL.

And now comes the said appellee, by J. A. Crain, his attorney, and moves the court to dismiss the appeal herein.

And the court being now fully advised in the premises, it is ordered by the court that said motion be, and the same is hereby, overruled.

65 And afterwards, to wit, on the 11th day of March, A. D. 1882, the same being a day of the March term, 1882, of said supreme court, the following proceedings were had and entered of record in said cause, to wit:

Appeal from 2d Dist.

CHARLES W. BOYNTON
vs.
PLOWDEN H. BALL. } 534. 42.

Now on this day this cause comes on for hearing in the regular call of the docket, and it appearing to the court that a duly certified transcript of the record and proceedings of the court below, together with printed abstracts thereof, and briefs and arguments of counsel in support of the errors assigned herein have been duly filed as required by law and the rules of this court in that behalf made and provided, and that this cause is here submitted upon such transcript, abstracts, briefs, and arguments of counsel for the consideration and judgment of the court, therefore—

66 It is ordered by the court that this cause be, and the same is hereby, taken under advisement.

And afterwards, to wit, on the 28th day of March, A. D. 1883, the opinion of the court was filed in the clerk's office of said court in said case in words and figures following, to wit:

67 CRAIG, *J.*:

Plowden H. Ball brought an action of debt against Chas. W. Boynton at the Sept. term, 1877, of the circuit court of Stephenson county to recover the amount of a decree which had been rendered in the circuit court of that county several years prior to the commencement of the action. At the following April term, 1878, of the court the defendant, by his attorney, filed a plea of the general issue. On the 15th day of April, 1878, Boynton was adjudged a bankrupt in the United States district court for the northern district of Illinois. At the December term, 1879, of the court the cause was called for trial, and the parties appeared by their attorneys, waived a jury, and a trial was had before the court, which resulted in a judgment in favor of the plaintiff for the amount of the decree, together with the interest thereon. After the rendition of the judgment, and on the 23rd day of December, 1880, Boynton received his final discharge in bankruptcy, and on the 25th day of March, 1881, he filed this petition and motion in the Stephenson circuit court for a perpetual stay of proceedings in the judgment on the ground that he had received his discharge in bankruptcy. The motion was heard by the court and overruled. An appeal was taken to the appellate court, where the judgment of the circuit court was affirmed, and Boynton appealed to this court.

Whether a perpetual stay of proceedings to enforce the collection of the judgment against the bankrupt shall be granted depends upon the construction to be placed upon the bankrupt act of 1867.

Sec. 5106 declares:

"No creditor whose debt is provable shall be allowed to prosecute to final judgment any suit at law or equity therefor against

68 the bankrupt until the question of the debtor's discharge shall have been determined, and any such suit or proceedings shall,

upon the application of the bankrupt, be stayed to await the determination of the court of bankruptcy on the question of the discharge, provided there is no unreasonable delay on the part of the bankrupt in endeavoring to obtain his discharge; and provided also that if the amount due the creditor is in dispute the suit, by leave of the court in bankruptcy, may proceed to judgment for the purpose of ascertaining the amount due, which amount may be proved in bankruptcy, but execution shall be stayed."

Sec. 5117 provides that no debt created by fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in a fiduciary character shall be discharged.

Sec. 5118 declares that no discharge shall release or affect any person liable for the same debt for or with the bankrupt.

Sec. 5119 provides that "A discharge in bankruptcy duly granted shall, subject to the limitations imposed by the two preceding sections, release the bankrupt from all debts, claims, liabilities, and demands which were or might have been proved against his estate in bankruptcy."

It will be observed that Boynton, after he was adjudged a bankrupt, did not appear in the circuit court where the action was pending against him and enter a motion for the continuance of the cause or a stay of proceedings until the determination of the court of bankruptcy on his discharge, as he might have done under sec. 5106 of the bankrupt act, and on account of a failure on the part of Boynton to procure such stay of proceedings it is contended that the judgment rendered against him was not affected by his final
69 discharge subsequently obtained. The question involved has led to much discussion among law writers, and, although it has often arisen in the courts of England and the United States, the decisions are by no means harmonious. We have been referred to a large number of cases decided in England, where the courts hold that a judgment rendered against a bankrupt after he was declared a bankrupt and before the final discharge was obtained upon a pre-existing debt is released by the discharge. Among the number is Blandford *vs.* Foot, 1st Cowp., 138, which is a leading case on the subject. We do not question the rule in England; it is uniform; but the decisions in England cannot be relied upon as authority here, for the reason they are predicated on a provision in the statute of that country which does not exist in our bankrupt law. The substance of the statute is if the creditor did obtain judgment before final discharge and take the debtor on execution he should be discharged on motion. See dissenting opinion of Bronson, C. J., in Clark *vs.* Rowling, 3 N. Y., 225, and opinion of the court in *In re* Gallison, 2 Lowell, Cir. C., 74 where the statute of England is quoted and considered. If our bankrupt law contained the same provision as that of England then the decisions of that court might be regarded as authority; but such is not the case. As stated before in the United States the decisions on the question are in direct conflict. Under the bankrupt act of 1841 in Maine, Massachusetts, and some other States it was held that a discharge in bankruptcy did not release a judgment rendered against the bankrupt pending the proceed-

ings in bankruptcy; that where a judgment is recovered on a debt provable under the bankrupt proceedings against the bankrupt the original debt becomes merged and extinguished in the judgment which is not provable against the bankrupt.

70 Holbrook *vs.* Foss, 27 Me., 441.
Fisher *vs.* Foss, 30 Me., 459.
Pike *vs.* McDonald, 32 Me., 418.
Sampson *vs.* Clark, 2 Cush., 173.
Woodbury *vs.* Perkins, 5 Cush., 86.
Faxon *vs.* Baxter, 11 Cush., 35.

In New York, Vermont, and some other States it has been held that if the debt upon which the judgment was rendered was one provable against the bankrupt and would be cut off by the discharge, the judgment rendered upon such a debt would be barred and cut off by the discharge.

Harrington *vs.* McNaughton, 20 Vt., 293.
Downer *vs.* Rowell, 26 Vt., 397.
Dresser *vs.* Brooks, 3 Barb., 429.
Church *vs.* Rowling, 3 N. Y., 116.

We shall not, however, stop to determine what is the correct rule under the act of 1841, as there is, in our judgment, a marked distinction existing between the act of 1841 and the act of 1867. The act of 1841 made no provision whatever for the postponement of an action pending against a bankrupt between the time he was adjudged a bankrupt and the time he received a final discharge. This seeming defect in the act of 1841 was cured by the provision contained in sec. 5106 of the act of 1867, in these words:

Any such suit or proceeding shall, upon the application of the bankrupt, be stayed to await the determination of the court of bankruptcy on the question of the discharge.

Here is a complete remedy provided *if* the bankrupt desires to avail of it to prevent a judgment from being rendered against him until he can procure a final discharge. The object, of course, was to prevent a judgment which the discharge might not relieve the bankrupt from, as held by the courts of Maine and Mass.,
71 until the discharge should be granted, which the bankrupt could then plead in bar of the pending action against him and thus prevent the rendition of a judgment in the court in which the action may be pending.

Under section 5119 Boynton's discharge released him from all debts which were or might have been proved against his estate in bankruptcy. Was the judgment in question a debt of that character? Obviously the section means all indebtedness existing at the time Boynton was declared a bankrupt, which was April 15th, 1878. At this date the judgment was not in existence, as it was not rendered until December, 1879. But, it is said, the debt upon which the judgment was rendered was in existence at the time Boynton was adjudged a bankrupt, and, as the original indebtedness was provable and would have been barred by the discharge, the judgment stands in the same position.

It may be regarded a well-settled and uniform rule of law that every cause of action will, if recovered upon, merge into the judgment or decree. Freeman on Judgments, sec. 216. If the action is upon a simple contract, a bond, or a judgment of a court of record in either case, when a recovery is had, the cause of action is merged into the judgment when a judgment has been rendered. Freeman, in his work on Judgments, sec. 217, says: "Every judgment is, for most purposes, to be regarded as a new debt, the chief and perhaps the only exception being in cases where the technical operation of the doctrine of merger would produce manifest hardship, and even these cases are by no means universally excepted. This new debt is not in general affected by the character of the old one." The author, in sec. 245, however, says: In no class of cases has the technical operation of the doctrine of merger been so frequently limited as in those where the effect of a discharge under laws for the relief of insolvents had to be de-
72 termined. An able discussion of this subject may be found in Gould *vs.* Hayden, 63 Ind., 448, where a judgment had been rendered in a court of record in that State, and afterwards a recovery was had on the judgment in the State of Ohio. The question was whether the first judgment was so merged and absorbed in the second judgment as to destroy the lien and validity of the first judgment. It is there said: The plaintiff may enforce its collection by the process of the court in which he obtained his judgment, or he may, if he may elect so to do, use his judgment as an original cause of action, and bring suit thereon in the same or some other court of competent jurisdiction, and prosecute such suit to final judgment. This procedure he may pursue as often as he elects, using the judgment last obtained as a cause of action on which to obtain the next succeeding judgment; but the very freedom with which this may be done, *ad infinitum*—and we know of no law or legal principle which would prevent its unending repetition—is, to our minds, a convincing and conclusive reason why each successive personal judgment ought to and must be regarded as a complete merger and extinguishment of the preceding judgment, with all its qualities and incidents. Each successive personal judgment is a new "debt of record," in which the precedent debt, though theretofore evidenced by a judgment, is as completely merged and absorbed as it would have been if it had been evidenced by note, bill, bond, or any other evidence of debt.

In the case of *In re* Gallison, 2 Lowell, Cir. C., 74, Lowell, Justice, in discussing this question, after reviewing various authorities, says:

"For the reasons given, and upon a careful examination
73 of the decisions, I am of opinion that a judgment obtained after the adjudication in bankruptcy creates a new debt which cannot be proved in bankruptcy, because the judgment is a merger and creates a new debt, and that the judgment creditor cannot oppose the discharge, because he has no provable debt, and because the discharge will be no bar to the judgment."

There are cases which hold a contrary view. While the general doctrine of merger is admitted, it is held that the rendition of a

judgment does not, within the meaning of the law, create a new debt; such are—

Dresser *vs.* Brooks, 3 Barber, 429.
Dowson *vs.* Hartsfield, 79 N. C.
In re Stephen Brown, 3 N. R. Register, 585.

But we are satisfied the better doctrine, and that, too, established by the later decisions, is that a judgment rendered after an adjudication in bankruptcy creates a debt which cannot be proved against the bankrupt's estate; that the indebtedness existing prior to the recovery becomes merged in the judgment. If, however, we are not correct in this view there is another ground which will preclude the bankrupt from impeaching the judgment, which has been clearly stated by the supreme court of Mass. in Bradford *vs.* Rice, 102 Mass., 472. The court, after holding that a debt provable against the bankrupt, when reduced to judgment pending the proceedings, is merged and extinguished, then says:

The creditor, by taking judgment, and so changing the form of his debt, and securing to himself the benefit of conclusive and permanent evidence of it and an extension of the period of limitation of an action thereon, is held, on his part, to have elected to look to the debtor personally, and to abandon the right to prove
71 against his estate; and the debtor, on the other hand, who might have protected himself by moving the court in which the action was pending for a continuance, in order to afford him an opportunity to obtain and plead a certificate of discharge, is held, by omitting to make such a motion before judgment, to have waived the right to set up his certificate against the plaintiff's claim; and therefore the rights of both parties must be governed by the judgment which the one has moved for and the other has suffered to be rendered.

What right has Boynton to complain that a judgment was rendered against him in the Stephenson circuit court? He was served with process, appeared and pleaded to the action, he knew the action was pending when he was adjudged a bankrupt, and he knew that he could obtain a stay of proceedings, by entering a motion for that purpose, until he could obtain a discharge and plead it in bar of the action; and yet he made no effort whatever to procure a stay, but, on the other hand, voluntarily submitted to a trial. It was his own negligence which led to the judgment which he now seeks by motion to avoid. A motion for relief as against a judgment of this character may be treated as an equitable proceeding, and it is a well-established rule that a party who fails to make a defence at law shall not be permitted to come into equity and have such defence allowed, unless he can show he was prevented by accident, mistake, or fraud, which is not pretended in this case.

[In] Jevne & Almi *vs.* Osgood, 57 Ill., 345, the circuit court did not lose jurisdiction of the case because Boynton was adjudged a bankrupt, but, as was held in Eyster *vs.* Goff, 1 Otto, 521, it was the duty of the court to proceed with the cause until, by some pleadings, the court was informed of the changed relations of the parties. See also

Holden *vs.* Sherwood, 84 Ill., 92. The circuit court could do
75 nothing less than proceed with the case to final judgment, and, as the judgment is to be regarded as the joint act of Boynton, who of his own choice allowed it to be rendered, and of the plaintiff, upon whose motion it was rendered, the rights of these two parties must be regarded as finally settled by that judgment. We are not aware of any case that holds that where a defence might have been made to a pending cause of action, but was not set up solely through the negligence of a defendant, that such defendant may afterwards interpose the same defence to the judgment which has been rendered against him. It is ordinarily enough that a party has had a day in court and an opportunity to plead his defence. The bankrupt act in clear terms provides for the stay of an action which may be instituted against the bankrupt until his discharge is passed upon. This salutary provision was incorporated into the law for the purpose of enabling a defendant situated as was appellant to plead his discharge in bar of the action; but, as appellant gave no heed whatever to the law and through his own negligence allowed a judgment to be rendered against him, what reason can be urged for holding that the judgment shall not be binding upon him? None is perceived. The judg[ment] of the appellate court will be affirmed.

SCOTT, *C. J.*, and DICKEY, *J.*:

We do not concur in this opinion.

Endorsed: Filed March 28, 1883. E. F. Dutton, clerk.

76 At a supreme court begun and held at Ottawa on Tuesday, the — day of ——, in the year of our Lord one thousand eight hundred and eighty —, within and for the northern grand division of the State of Illinois.

Present: —— ——, chief justice; —— ——, justice; —— ——, justice; —— ——, justice; —— ——, justice; —— ——, justice; —— ——, justice; —— ——, attorney general; —— ——, sheriff; —— ——, clerk.

Be it remembered, to wit, on the 28th day of March, A. D. 1883, the same being in vacation after the term of court aforesaid, the following proceedings were by said court had and entered of record, to wit:

Appeal from Appellate Court, Second District.

CHARLES W. BOYNTON *vs.* PLOWDEN H. BALL. } No. 534. 11 A. D.

On this day came again the said parties, and the court having diligently examined and inspected as well the record and proceedings aforesaid as the matters and things therein assigned for error, and being now sufficiently advised of and concerning the premises, for that it appears to the court now here that neither in the record and proceedings aforesaid nor in the rendition of the judgment

aforesaid is there anything erroneous, vicious, or defective, and that that record is no error; therefore it is considered by the court that the judgment aforesaid be affirmed in all things and stand in full force and effect, notwithstanding the said matters and things therein assigned for error. And it is further considered by the court that the said appellee recover of and from the said appellant his costs by him in this behalf expended, and that he have execution therefor.

77 STATE OF ILLINOIS, *ss:*

Supreme Court, Northern Grand Division.

I, Everell F. Dutton, clerk of the supreme court in and for the northern grand division of the State of Illinois, do hereby certify that the foregoing is a true copy of the record and proceedings in the above-entitled cause of record in my office.

In testimony whereof I have set my hand and affixed the seal of the said supreme court, at Ottawa, this 20th day of April, in the year of our Lord one thousand eight hundred and eighty-three.

[Seal of the Supreme Court, State of Illinois, Aug. 23, 1818.]

E. F. DUTTON,
Clerk of the Supreme Court.

78 Supreme Court of the United States.

Know all men by these presents that we, Charles W. Boynton and Wallace W. Boynton, of the city of Chicago, county of Cook, and State of Illinois, are held and firmly bound unto Plowden H. Ball, of Erie, in the State of Pennsylvania, in the sum of one thousand dollars, to be paid to the said Plowden H. Ball, his executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this seventh day of April, A. D. 1883.

Whereas the above Charles W. Boynton hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment of the supreme court of Illinois rendered in a certain suit wherein the said Charles W. Boynton was the appellant and Plowden H. Ball the appellee:

Now, therefore, the condition of this obligation is such that if the above-named Charles W. Boynton shall prosecute the said writ of error to effect and answer all costs and damages if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and virtue.

CHARLES W. BOYNTON. [SEAL.]
WALLACE W. BOYNTON. [SEAL.]

Witness:
W. C. GOUDY.

(Endorsed:) Filed April 10th, 1883. E. F. Dutton, clerk.

79 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of Illinois, Greeting:

Because in the records and proceedings as also in the rendition of the judgment of a plea which is in the said supreme court of Illinois, being the highest court of law and equity of the State of Illinois in which a decision could be had, between Charles W. Boynton against Plowden H. Ball, wherein a right, privilege, and immunity was claimed under a statute of the United States and the decision was against the right, privilege, and immunity specially set up and claimed under such statute, manifest error hath appeared, to the great damage of the said Charles W. Boynton, as by his complaint appears, we, being willing that the error, if any hath been, should be duly corrected and full & speedy justice done to the party aforesaid in this behalf, do command you that, under your seal, you send the record & proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ,

80 so that you may have the same at Washington on the second Tuesday of October next, in the said Supreme Court to be then & there held, that, the record & proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this nineteenth day of April, in the year of our Lord one thousand eight hundred and eighty-three, and of the Independence of the United States the 107th year.

[Seal of Circuit Court U. S., Northern Dist. Illinois. 1855.]

WM. H. BRADLEY,
Clerk U. S. Circuit Court, Nor. Dist. Ill.

This writ is allowed, and will be made a supersedeas on the plaintiff in error, Charles W. Boynton, giving bond in the sum of one thousand dollars, in the usual form and containing the usual conditions, with Wallace W. Boynton as surety.

Done at Bloomington, Ills., April 7, 1883.

JOHN M. SCOTT,
Chief Justice of Illinois Supreme Court.

[Endorsed:] Filed Apr. 10, 1883. E. F. Dutton, clerk.

81 STATE OF ILLINOIS:

Supreme Court, Northern Grand Division.

I, Everell F. Dutton, clerk of the supreme court in and for the northern grand division of the State of Illinois, for return to the foregoing writ of error, do hereby certify the foregoing to be a true copy of the record and proceedings as above set forth in the cause specified in said writ of error, wherein Charles W. Boynton is plaintiff in error and Plowden H. Ball is defendant in error, including as well the record and proceedings of the circuit court of Stephenson

county and in the appellate court of Illinois, second district, as the proceedings in said supreme court of Illinois in said cause, together with said writ of error and the order allowing the same, also the certificate of Hon. John M. Scott, chief justice of the supreme court of Illinois, and a copy of the bond given by said plaintiff in error in that behalf, the original of said bond remaining on file in the office of the clerk of said court.

Witness Everell F. Dutton, clerk of said supreme court of Illinois, and the seal thereof, at Ottawa, this 23rd day of April, A. D. 1883.

[Seal of the Supreme Court, State of Illinois. Aug. 23, 1848.]

E. F. DUTTON, *Clerk.*

82 *Writ of Error to the Supreme Court of Illinois.*

In the Supreme Court of the United States. October Term, A. D. 1883.

CHARLES W. BOYNTON *vs.* PLOWDEN H. BALL.

It is hereby admitted that a citation signed by the chief justice of the supreme court of Illinois in due form of law, returnable to the October term of the Supreme Court of the United States, 1883, was duly served on the 22d day of April, 1883, by exhibiting the original to the undersigned and giving him a copy thereof, and that the said original and copies have been mislaid and lost, and it is agreed that this admission shall stand with the same effect as the original citation returned served.

PLOWDEN H. BALL,
By J. A. CRAIN, *His Att'y.*

[Endorsed:] U. S. Sup. C't. Boynton *vs.* Ball. Stipulation.

Endorsed on cover: Illinois supreme court. No. 187. Charles W. Boynton, plaintiff in error, *vs.* Plowden H. Ball. Filed 22nd October, 1883.

121-457

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1886.

CHARLES W. BOYNTON,
PLAINTIFF IN ERROR,

vs.

PLOWDEN H. BALL,
DEFENDANT IN ERROR.

ARGUMENT FOR PLAINTIFF IN ERROR.

LEONARD SWETT,
EDWARD R. SWETT,
FOR PLAINTIFF IN ERROR.

SWETT, GROSSCUP & SWETT,
OF COUNSEL.

BARNARD & GUNTHORP, LAW PRINTERS, 44 & 46 LaSALLE ST., CHICAGO

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IN THE

SUPREME COURT OF THE UNITED STATES.

CHARLES W. BOYNTON,
PLAINTIFF IN ERROR,

VS.

PLOWDEN H. BALL,
DEFENDANT IN ERROR.

STATEMENT OF THE QUESTIONS.

The questions in this case arise under the Bankrupt Law of 1867, and mainly under sections 14, 5,106, 5,114 and 5,119.

They are whether (1) a plaintiff can obtain a lawful judgment against a defendant after he has been adjudicated a bankrupt and before his discharge, upon service had before the adjudication, upon the defendant; and when, after the adjudication, he does not make the assignee in bankruptcy a party to such suit.

We contend that the service should have been had and the proceedings should have been against the defendant until his adjudication, but thereafter, the assignee should have been made a party, and the subsequent proceedings had against him.

If these conditions are complied with, it is conceded that for the purpose *only* of ascertaining the amount due,

as the basis of a dividend, a valid judgment may be obtained.

2. If the plaintiff actually gets a judgment pending proceedings in bankruptcy, and before discharge, can the defendant, upon motion, obtain a stay thereof by producing to the court which entered it, a copy of his discharge in bankruptcy, properly authenticated?

We contend that he can, and accordingly that the judgment and proceedings in this case should have been stayed.

3. If the debt upon which the judgment was obtained was already a judgment debt, but under the statutes of the State of Illinois, by the laches of the defendant had become outlawed, and no execution could be issued upon it until it was revived, and to revive it the plaintiff commenced an action of debt in the same court where the original judgment was pending, and declared upon and introduced the first judgment in evidence upon the trial of the second case, and obtained a judgment for the amount of the first judgment, with six per cent. interest, fixed by statute, and a judgment upon which execution could be issued, do these proceedings constitute such a loss of the identity of the first judgment, which was provable in bankruptcy under the bankrupt act, and from which the defendant was discharged, and does this new judgment become a new debt, which cannot be proved, but which can be collected, in full, out of the new assets of the bankrupt after his discharge?

It is our contention that the original judgment was provable in bankruptcy; that the obtaining the second judgment was *an unlawful act*, and falls under the ban of such acts, and that no lawful judgment could be obtained except as conceded above.

Assignment of Errors.

1. The court erred in sustaining the overruling of the motion to stay the proceedings in this case in the Stevenson Circuit court, upon the judgment obtained the 9th day of December, A. D. 1880, based upon the discharge in bankruptcy of the defendant, properly authenticated.

2. The court erred in holding, as it did, that a suit pending against a bankrupt at the time of his adjudication, can be lawfully prosecuted against such bankrupt after his adjudication and before his discharge, without making the assignee a party defendant, and when the amount due is in dispute, in which case a judgment may be obtained to be used only, and as the basis of a dividend.

3. The court erred in not holding that when the defendant in any suit is adjudicated a bankrupt he becomes *civiliter mortuis*. Thereafter his assignee should be made a party to the suit against him, and *he*, and not the bankrupt thereafter, "may prosecute and defend all suits "at law or in equity pending at the time of the adjudi- "cation in bankruptcy, in his own name, in the same "manner and with like effect as they might have been "prosecuted or defended by such bankrupt."

4. When the assignee is thus made a party to the suit, and where the amount is in dispute, such suit may be prosecuted only as the basis of a dividend, and where the assignee is not made a party, but the plaintiff proceeds against the original defendant upon service originally had, a judgment thus obtained is void.

5. The court erred in holding, as in effect it did, that notwithstanding a defendant is adjudicated a bankrupt, pending the litigation against him, he does not become *civiliter mortuis*, and may be proceeded against the same as if he had not been adjudicated a bankrupt, and the assignee need not be made a party, and if the plaintiff is smart, he can evade the law, and obtain a judgment which he can make in full, out of the new assets of the bankrupt obtained since his discharge, notwithstanding the bankrupt act itself makes the obtaining such judgment *an unlawful act*.

6. The court erred in holding that where, under the statutes of the State of Illinois, a judgment has become outlawed, and an execution cannot be issued upon it until it is revived, the process of obtaining a new judgment, which represents the old judgment with six per cent. interest, so that an execution may be issued upon such new judgment, constituted such a merger, that the identity of the first judgment is lost, and the new judgment obtained in contravention of the bankrupt act, becomes a new debt, and cannot be proved in bankruptcy, and may be collected in full out of the new assets of the bankrupt.

7. The court erred in holding that the privilege granted granted to the bankrupt of staying proceedings against him, pending his bankruptcy, and before discharge, constitutes a duty upon the part of said defendant, and unless he executes that duty promptly and efficiently, and obtains such stay, he loses all benefit of his bankruptcy, as to such debts, provided the plaintiff is smart enough to obtain a judgment against him; notwithstanding the obtaining of such judgment is placed under a ban by the statute, as *an unlawful act*, the law will reward him for such

unlawful act, by a payment in full of his judgments out of the new assets of the bankrupt.

8. The court therefore, by construction, interpolates a clause into the bankrupt act which does not exist there, and avoids the release from the debt given to the bankrupt, provided he will comply with other provisions of the statute.

LEONARD SWETT,
Counsel for the Plaintiff in Error.

MATERIAL FACTS SHOWN BY THE RECORD.

At the September term of the Stephenson Circuit court, at Freeport, in Illinois, A. D. 1865, and in the Northern district, of the District court of the United States, for the State of Illinois, a creditor's bill was filed by Edgar F. Griffith and Plowden H. Ball, against Jennie Boynton, Frederick Boynton, Clara Boynton, heirs-at-law of Stuart G. Boynton, Theophilus K. Greenwood, administrator of the estate of Stuart G. Boynton, Wallace Boynton, Jerome C. Boynton, *and Charles W. Boynton, then and since then a resident of Chicago, Illinois, and the plaintiff in error in the present case*, and decree obtained for $6,223.99. It was found that C. W. Boynton had before that time received from Stuart G. Boynton fifteen hundred dollars, with which he was to enter land in partnership, and that he owed his brother, on account of said transaction, the sum of $6223.99, for which this decree was entered.

"After entry of this decree, Edgar F. Griffin died, leav-
"ing as survivor Plowdin H. Ball, and afterwards, no

" execution having ever been issued on said decree against " said Charles W. Boynton, and said decree having be- " come outlawed, an action of debt on said decree was " brought by said Plowdin H. Ball against said Charles " W. Boynton, in the Circuit court of said Stepenson " county to the September term A. D. 1877." (Crane's affidavit, Abst., 12.)

This proceeding was rendered necessary by reason of the following provisions of the Illinois statutes, chapter 77, section 1. It provides:

" That a judgment of a court of record shall be a lien " on the real estate of the person against whom is ob- " tained, situated within the county for which the court is " held, from the time the same is rendered or revived for " the period of seven years, and no longer. * * * " When execution is not issued on the judgement within one " year from the time the same becomes a lien, it shall there- " after cease to be a lien; but execution may issue on such " judgment at any time within said seven years, and shall " become a lien on such real estate from the time it shall " be delivered to the sheriff, or other proper officer, to be " executed." Section 6, of said chapter also provides that:

" No execution shall issue upon any judgment after " the expiration of seven years from the time the same " becomes a lien, except upon the revival of the same by " *scire facias;* but real estate levied upon within said " seven years may be sold upon a *venditio rei exponas*, at " any time within one year after the expiration of said " seven years."

This decree against this plaintiff under the provisions of the Illinois statue, no execution having been issued

upon the same, became outlawed in so far as the right to have an execution issued, on the 20th day of September, 1872. And the object of this action of debt which was commenced in September, 1877, was to revive such judgment and obtain through such revival the right to establish the lien on it and to issue an execution thereon.

On the 9th day of December, 1879, a judgment was entered against the plaintiff upon said old judgment and interest, for six thousand two hundred twenty-three dollars ninety-nine cents debt, and five thousand two hundred thirty-four dollars and ninety-nine cents damages, or for a total of eleven thousand four hundred fifty-eight dollars and ninety-eight cents.

On the 15th day of April, 1878, about seven months and a half after the action of debt to revive the decree obtained September 20, 1865, had been begun, nearly eighteen months before judgment was entered, Charles W. Boynton was in the United States District court for the Northern district of Illinois, and which embraced Stephenson county and Freeport, adjudicated a bankrupt. In the schedule of his debts filed with his petition in bankruptcy, this decree in favor of Ball, obtained at Freeport in 1865, was scheduled as follows:

"INDEBTEDNESS. P. H. Ball, Erie, Penn., banker, "amount, $6,423, contracted September, 1865; nature of "debt, decree in chancery. This decree was obtained by "P. H. Ball and Edgar F. Griffin."

A certified copy of the warrant in bankruptcy was published by the marshal in the Inter Ocean and Evening Journal at Chicago, and also personal service was had upon the said Plowdin H. Ball. Notice to creditors by the

United States marshal also shows that said Ball was notified of said proceedings in bankruptcy. (See Abst., 9.)

On or about the 19th of April, 1879, eight months before the judgment was rendered reviving the decree of September 20, 1865, Charles W. Boynton, the plaintiff herein, obtained a certified copy of his adjudication in bankruptcy sent it to his brother, Jerome Boynton, at Freeport, Ill., with instructions to hand the same to Henry C. Hyde, or some other attorney at Freeport, and employ said attorney to go into court and present such certified copy and suggest his adjudication in bankruptcy, and obtain a stay of proceedings in the action of debt upon the decree of 1865, then pending against him.

Having sent the certified copy, said Charles W. Boynton relied upon his instructions being carried out and said stay of proceedings obtained. He heard nothing more of the matter until about the 20th of December, A. D. 1880, when said brother informed him that said certified copy of his adjudication in bankruptcy had never been presented to the court and the stay had never been obtained. On the ninth day of December, 1880, the judgment for $11,458.98 was rendered. The following is what Mr. Boynton says upon this subject, and which is nowhere denied:

"Affiant further swears that whilst the proceedings "were pending in this court to revive said decree or judg- "ment, and on or about the 16th day of April, A. D. "1878, he was duly adjudicated a bankrupt in the Dis- "trict court of the United States for the Northern dis- "trict of Illinois, and that on or about the 18th day of "April, 1879, hearing that the proceedings were still "pending for the revival of said judgment or decree, he

" sent to his brother, Jerome Boynton, at Freeport, " a certified copy of his adjudication in bankruptcy with " instructions to his said brother to hand said copy of " adjudication to Henry C. Hyde, or some other attorney " of the city of Freeport, and to employ said attorney " to go into said Circuit court of Stephenson county, and " suggest his adjudication in bankruptcy in this case and " present said certified copy to the court, and move to " stay proceedings in said revival until the question of his " discharge could be decided.

" Affiant further swears that he did not immediately hear " from his brother in regard to said instructions, but sup- " posed the suggestion of bankruptcy had been made and " the proceedings upon said revival had been stayed until " about December 20th, A. D. 1880, when his brother " sent the said copy of adjudication to him, saying it had " not been presented.

" Affiant further swears that he did not know even at " that time that this judgment had been revived in this " court, and when, within three or four days afterwards, " he obtained his discharge in bankruptcy, he immediately " sent said discharge to Freeport, to his brother, instruct- " ing him to give said discharge to Mr. Hyde, and to be " sure that he went in and attended to said suit.

" Affiant further swears that a few days thereafter he " received a letter from his brother, saying that Mr. Hyde " had informed him that said judgment had been revived, " and that no suggestion for stay of proceedings had been " made.

" Affiant further swears that until this time he had not " the most remote idea but that the certified copy had " been presented to this court and proceedings had been

"stayed, and affiant says that it was wholly due to the "negligence of his brother, of which negligence he had "no knowledge whatever."

SUMMARY.

The following is a summary of these facts:

1. 1865. Decree in chancery against the Boyntons in the Stephenson Circuit court, Illinois, among whom was the plaintiff in error, Charles W. Boynton, for $6,223.99.

2. 1877. Action in the same court of *Ball* v. *The Plaintiff*, to revive this decree, the same having become outlawed.

3. April 15, 1878. Plaintiff decreed a bankrupt in the United States Circuit court at Chicago, a schedule of this debt among the balance as follows: P. H. Ball, Erie, Pennsylvania, banker; amount, $6,423; contracted September, 1865; nature of debt decree in chancery.

4. 1878. Publication of proceedings in bankruptcy, by order of court and personal service on Mr. Ball.

5. April 19, 1879. Copy of adjudication in bankruptcy was sent by the plaintiff in error to his brother, who lived near Freeport, asking him to employ a lawyer and have it presented to the court.

6. December 9, 1880. A judgment was rendered against the plaintiff for $11,458.98.

7. December 20, 1880. The plaintiff, who had supposed said business had been properly attended to by his brother, received word from said brother that the certified copy had never been presented.

8. About December 24, 1880, said plaintiff, not yet knowing revival of the decree, caused a copy of his discharge in bankruptcy to be sent to his brother with instructions to have the same presented and a stay obtained.

9. A few days thereafter the brother wrote the plaintiff that the decree had been entered reviving said judgment, and his papers, sent by him, had never been presented.

10. The plaintiff relied upon his brother and all the time supposed his certificate of adjudication had been presented and the proceedings at Freeport had been stayed.

Questions of Law and How They Arise.

On the 23d day of December, 1880, Charles W. Boynton, the plaintiff in error, obtained his discharge in bankruptcy, and on the 25th day of March, 1881, filed a motion, based of said discharge, in the Circuit court of Stephenson county, at Freeport, to procure a stay of proceedings upon the judgment revived the 9th day of December, 1880. This motion was overruled by the court; an appeal was then taken to the Appellate court of the Second district of Illinois, and the motion was overruled there. In neither of these courts was any written opinion given. An appeal was then granted to the Supreme court of the State of Illinois, which court also overruled the motion in a written opinion which, without doubt, will be produced by our adversaries, and a writ of error was taken to this court by Charles W. Boynton, who is plaintiff in error herein.

This opinion is found in the 105th Ills. Reports, page 627.

It holds: *First.* An alleged bankrupt might, under the law of 1867, procure a stay of the proceedings against him, and Boynton having failed to procure such stay, loses his right of discharge as to such debt, under the bankrupt act. *Secondly.* A judgment obtained against one after he is adjudged a bankrupt, creates a new debt, which cannot be proved in bankruptcy, because the judgment is a merger, and the old debt is merged in a new security. This follows the case *In re* Gallison, 2 Lowell, C. C., 74, and the dissenting opinion of BRONSON in *Clark* v. *Rowling*, 3 N. Y., 225,

In presenting the authorities, we shall consider the English cases in bankruptcy and those arising under the bankrupt act of 1841, as well as those under the bankrupt act of 1867. It will be necessary to consider the English statutes of bankruptcy, the act of 1841 and the act of 1867, in order to know whether the statutes are in legal effect alike or wherein they differ, in order to apply the decisions under these various acts to the question herein presented. That question is as follows:

DOES BALL, BY OBTAINING A JUDGMENT UPON HIS DECREE, AVOID THE LEGAL EFFECT OF THE DISCHARGE IN BANKRUPTCY OF BOYNTON ISSUED AFTER THAT JUDGMENT HAD BEEN OBTAINED? DOES HE ACQUIRE THE RIGHT TO COLLECT HIS WHOLE DEBT, NOW MORE THAN $15,000, OUT OF THE ASSETS OF BOYNTON ACQUIRED SINCE HIS DISCHARGE? OR DOES BOYNTON'S DISCHARGE, WHICH RELEASES HIM FROM ALL DEBTS THAT "EXISTED ON THE 15TH DAY OF APRIL, 1878," RELEASE HIM FROM THIS DEBT, WHICH EXISTED AT THAT TIME, AND WAS PROVABLE IN BANKRUPTCY, AND WHICH WAS SCHEDULED AMONG BOYNTON'S OTHER INDEBTEDNESS, AND OF WHICH

BALL HAD NOTICE, BOTH PERSONALLY AND BY PUBLICATION, UNDER THE ORDER OF THE COURT?

OUR CONTENTION IS THAT BOYNTON HAVING BEEN ADJUDICATED A BANKRUPT ON THE 15TH DAY OF APRIL, 1878, AND THIS DEBT BEING SCHEDULED, AND BALL HAVING HAD NOTICE PERSONALLY, IT BECAME HIS DUTY UNDER THE STATUTE, AS HIS SUIT OF REVIVAL WAS PENDING WITHIN THE DISTRICT, TO PROVE HIS DECREE IN CHANCERY IN THE BANKRUPT COURT AND TAKE HIS PRO RATA DIVIDEND. INSTEAD OF WHICH, HE DISREGARDED THIS STATUTORY DUTY AND PROSECUTED HIS DECREE TO JUDGMENT OF REVIVAL WITHIN THE DISTRICT IN WHICH THE BANKRUPTCY PROCEEDINGS WERE PENDING, WHICH, BY THE BANKRUPT LAW, IS MADE AN UNLAWFUL ACT IN HIM, AND THIS JUDGMENT HAVING BEEN OBTAINED AFTER THE ADJUDICATION AND BEFORE HIS DISCHARGE, IT CAN NOW BE STAYED UPON MOTION.

THE ENGLISH BANKRUPT ACT, 5 Gev. 2, Chap. 30 of Sec. 7 of Geo. II., passed in 1732, provides that "every such bankrupt shall be discharged from all "debts by him, her or them due or owing at the "time that he, she or they become bankrupt; and "in case any such bankrupt shall afterwards be "arrested, prosecuted or impleaded for any debt due "before such time as he, she or they became bank-"rupt, such bankrupt shall be discharged upon com-"mon bail, and shall and may plead in general, that the "cause of such action or suit did accrue before such time "as he, she or they became bankrupts, and may give this "act and the special matter in evidence. * * *"

Section 48 of the same chapter provides, "and whereas "actions may have been brought against such bank-

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Section 48 of the same chapter provides, "and whereas "actions may have been brought against such bank-

"rupts, and other proceedings had thereupon, for causes "and matters arising and growing due before the bank- "ruptcy of such bankrupts, be it further enacted by the "authority aforesaid, that all such actions, and all proceed- "ings thereon for any such causes or matters, shall be and "are hereby discharged against such bankrupts and their "bail so obtaining such certificates allowed as afore- "said."

The English act of 1806, chapter 135, Sec. 446 of Geo. III, English statutes at large, page 621, provides: "That all persons against whom any commission of "bankrupt shall hereafter issue, and who shall be duly "found bankrupts under the same, shall upon obtaining "his, her, or their certificate be discharged of and from "all debts, by this act made provable under such com- "mission." * * *

Also, the 49, Geo. III, Chap. 121, Sec. 14, p. 513, 1809, provides as follows: "and be it further enacted by the au- "thority aforesaid, that from and after the passing of this "act, it shall not be lawful for any creditor, who has or shall "have brought any action, or instituted any suit against "any bankrupt, in respect of any demand which arose prior "to the bankruptcy of such bankrupt, or which might "have been proved as a debt under the commission of "bankrupt issued against such bankrupt, to prove a "debt under such commission for any purpose whatever, "or to have the claim of a debt entered upon the pro- "ceedings under such commission, without relinquishing "such action or suit, and all benefit from the same; and "that the proving or so claiming a debt under a commis- "sion of bankrupt by any creditor, shall be deemed an "election by such creditor, to take the benefit of such

" commission with respect to the debt so proved or " claimed by him * *, *."

The English bankrupt act of 1825, 6 Geo. IV, chapter 16, Sec. 46, p. 61, provides that every creditor of the bankrupt *may* prove his debt by his own oath.

Section 59 p. 64, provides that " no creditor who has " brought any action, or instituted any suit against any " bankrupt in respect of a demand prior to the bankruptcy, " or which might have been proved as a debt under the " commission against such bankrupt, shall prove a debt " under such commission or have any claim entered upon " the proceedings under such commission, without relin- " quishing such action or suit; and in case such bankrupt " shall be in prison or custody at the suit of or detained " by such creditor, he shall not prove or claim as afore- " said, *without giving a sufficient authority in writing* " *for the discharge of such bankrupt; and the proving or* " *claiming a debt under a commission by any creditor, shall* " *be deemed an election by such creditor to take the benefit* " *of such commission, with respect to the debt so proved or* " *claimed.*"

Section 121, p. 82, provides "*that every bankrupt who* " *shall have duly surrendered, and in all things conformed* " *himself to the laws in force concerning bankrupts at the* " *time of issuing the commission against him, shall be dis-* " *charged from all debts due by him when he became a* " *bankrupt*, and from all claims and demands thereby " made provable under the commission, in case he shall " obtain a certificate of such conformity, so signed and " allowed, and subject to such provisions as hereinafter " directed." * * *

Section 126, p. 833, provides " that any bankrupt who

"shall after his certificate shall have been allowed, be ar-
"rested, or have any action brought against him for any
"debt, claim or demand hereby made provable under the
"commission against such bankrupt, shall be discharged
"upon common bail, and may plead in general that the cause
"of action accrued before he became bankrupt, and may
"give this act and the special matter in evidence, and such
"bankrupt certificate, and the allowance thereof shall be
"sufficient evidence of the trading, bankruptcy, commis-
"sion and other proceedings precedent to the obtaining
"such certificate; and if any such bankrupt shall be taken
"in execution, or detained in person for such debt, claim
"or demand, where judgment has been obtained before
"the allowance of his certificate, it shall be lawful for any
"judge of the court wherein judgment has been so ob-
"tained, on such bankrupt's producing his certificate,
"to order any officer who shall have such bank-
"rupt in custody by virtue of such execution, to dis-
"charge such bankrupt without exacting any fee, and
"such officer shall be hereby indemnified for so doing."

Section 135, p. 86, "provides, this act shall be construed
"beneficially for creditors, and nothing herein contained
"shall alter the present practice in bankruptcy, except
"where any such alteration is expressly declared." * * *

THE BANKRUPT ACT OF 1841. Section 4, chapter 9, act of 1841, U. S. Statutes at Large, volume 5, page 443, provides "that every bankrupt who shall *bona*
"*fide* surrender all his property, and rights of prop-
"erty, with the exception before mentioned, for the
"benefit of his creditors, and shall fully comply with
"and obey all the orders and directions which may from
"time to time be passed by the proper court, and shall

" otherwise conform to all the other requisitions of this " act, shall * * * *be entitled to a full discharge from* " *all his debts, to be decreed and allowed by the court* " *which has declared him a bankrupt.* * * * * * " And such discharge and certificate, when duly granted, " shall, in all courts of justice, be deemed a full and com- " plete discharge of all debts, contracts, and other engage- " ments of such bankrupt, which are provable under this " act, and shall be and may be pleaded as a full and com- " plete bar to all suits brought in any court of judica- " ture whatever, and the same shall be conclusive evi- " dence of itself in favor of such bankrupt. * * *"

Section 5 provides that "no creditor or other person " coming in and proving his debt or other claim, *shall be* " *allowed to maintain any suit at law or in equity there-* " *for*, but shall be deemed thereby to have waived all " right of action and suit against such bankrupt; and all " proceedings already commenced, and all unsatisfied " judgments already obtained thereon, shall be deemed to " be surrendered thereby. * * *"

We have examined the English bankrupt acts and the act of 1841 last quoted, repeatedly and carefully, and the above quotations embrace all the provisions which apply, even remotely, to the question presented in this case.

THE BANKRUPT ACT OF 1867, revised statutes of the United States, second edition, 1878, page 967, provides: " If any person residing within the jurisdiction of the " United States, and owing debts provable in bankruptcy " exceeding the amount of three hundred dollars, shall " apply by petition addressed to the judge of the judicial " district in which such debtor has resided or carried on " business for the six months next preceding the time of fil-

" ing such petition, or for the longest period during said six " months, setting forth his place of residence, his inability " to pay all his debts in full, his willingness to surrender " all his estate and the effects for the benefit of his credit- " ors, and his desire to obtain a discharge from his debts, " and shall annex to his petition a schedule and inventory, " in compliance with the next two sections, the filing of " such petition shall be an act of bankruptcy, and such " petitioner shall be adjudged a bankrupt."

Section 5,015 provides that the schedule named shall contain a true statement of all his debts and the place of residence of each creditor, the nature of the demand, whether founded on written security or otherwise, etc.

Section 5,016 provides that this inventory shall contain an accurate statement of the petitioner's estate, both real and personal.

Section 5,019 provides that " upon the filing of such " petition, schedule, and inventory, if the judge or register " shall forthwith, if he is satisfied that the debts due from " the petitioner exceed three hundred dollars, issue a war- " rant, to be signed by such judge or register, directed to " the marshal for the district, authorizing him forthwith, " as messenger, to publish notices in such newspapers " as the warrant specifies; to serve written or printed " notice by mail or personally, on all creditors upon the " schedule filed with the debtor's petition, or whose names " may be given to him in addition by the debtor; and " to give such personal or other notice to any persons " concerned as the warrant specifies."

Section 5,067 provides that all debts due and payable from the bankrupt at the time of the commencement of

proceedings in bankruptcy * * * may be proved against the estate of the bankrupt.

Section 5,076 provides that "creditors residing within "the judicial district where the proceedings in bankruptcy "are pending *shall prove* their debts before one of the "registers of the court," etc.; creditors residing without the district, but within the United States, may prove their debts before a register in bankruptcy, or a commissioner of the Circuit court, in the judicial district where such creditor or either one of joint creditors resides.

Section 5,105 provides that "no creditor proving his "debt or claim shall be allowed to maintain any suit at "law or in equity therefor against the bankrupt, but shall "be deemed to have waived all right of action against "him; and all proceedings already commenced or unsat-"isfied judgments already obtained thereon against the "bankrupt shall be deemed to be discharged and sur-"rendered thereby."

Section 5,106 provides: "No creditor whose debt is "provable *shall be allowed* to prosecute to final judgment "any suit at law or in equity therefor against the bank-"rupt, until the question of the debtor's discharge shall "have been determined; and any such suit or proceedings "shall, upon the application of the bankrupt, be stayed "to await the determination of the court in bankruptcy "on the question of the discharge." * * *

Section 5,114 provides: "If it shall appear to the court "that the bankrupt has in all things conformed to his "duty under this title, and that he is entitled, under the "provisions thereof, to receive a discharge, the court shall "grant him a discharge *from all his debts*, except as here-

" inafter provided, and shall give him a certificate thereof " under the seal of the court."

Section 5,119 provides: " A discharge in bankruptcy " duly granted shall, subject to the limitations imposed by " the two preceding sections, *release the bankrupt from* " *all debts*, claims, liabilities and demands, which were or " *might have been proved against his estate in bank-* " *ruptcy*. It may be pleaded by a simple averment that " on the day of its date such discharge was granted to " the bankrupt, setting a full copy of the same forth in " its terms as a full and complete bar to all suits brought " on any such debts, claims, liabilities or demands. The " certificate shall be conclusive evidence in favor of such " bankrupt of the fact, and the regularity of such dis- " charge."

The following is Mr. Boynton's discharge, obtained Dec. 23, 1880, from the United States District court:

" Whereas, Charles W. Boynton, of Chicago, of the county of Cook, in said district, has been duly adjudged a bankrupt under the Revised Statutes of the United States, entitled 'Bankruptcy,' and appears to have conformed to all the requirements of law in that behalf.

" It is therefore ordered by the court that said Charles W. Boynton be forever discharged from the debts and claims which by the said title are made provable against his said estate, and which existed on the 15th day of April, A. D. 1878, on which day the petition for adjudication was filed by him, Charles W. Boynton, except such debts, if any, as are by law excepted from the operation of a discharge in bankruptcy."

THE RULE OF THE ENGLISH CASES IS UNIFORM, AND BEARS UPON TWO BRANCHES OF THIS CASE. FIRST, THAT THE RELIEF SOUGHT MAY BE OBTAINED IN A SUMMARY MANNER BY MOTION OR RULE TO SHOW CAUSE; AND SECONDLY, IT SHOWS THAT THE DEFENDANT, HAVING OBTAINED A CERTIFICATE OR DISCHARGE, IS RELIEVED NOT ONLY FROM THE DEBT WHICH MIGHT HAVE BEEN PROVED, "BUT FROM ALL REMEDIES FOR "THE RECOVERY OF SUCH DEBT."

1. In *Boteflour* v. *Coates*, 1st Cowp., 25, decided in 1774, under the act of 1732 set forth, *ante*, page 9, the case is as follows:

In "a rule to show cause why the defendant, who "was a bankrupt and had obtained his certificate, should "not be discharged; the short of the case was, that in a "former action against the defendant he had given a bail "bond to the sheriff, which was forfeited before the com- "mission, by non-appearance. The present action was "brought upon this bail bond, and the defendant had ob- "tained his certificate under the commission, but the judg- "ment was not obtained until after certificate allowed." The court in this case held, that the defendant was discharged from the debt, and the rule was made absolute.

2. *Blandford* v. *Foot*, 1st Cowp., 138, decided in 1774, was under 12 Geo., 3, Chap. 48, Sec. 2, which provided for the discharge from prison of all bankrupts who had surrendered all their property under the act of 1732, the defendant became indebted upon a bond in

1756, and two years afterwards became bankrupt. After bankruptcy an action was brought on the bond and judgment obtained; subsequently the executors of the plaintiff brought a new action upon the judgment, and the defendant was put in custody upon it. Upon this was a rule to show cause why the defendant should not be discharged. The claim to the discharge rested upon the fact that the cause of action was antecedent to the commission in bankruptcy, the judgment was rendered after commission sued out and before discharge. Lord MANSFIELD said: "The only doubt that can arise in this case is with "respect to the interest and costs accrued since the bank- "ruptcy: but I think they stand upon the same founda- "tion as the original debt which was clearly due before "the bankruptcy, and therefore are equally within the "benefit of the statute." And Mr. Justice WILLIS said: "I am of the same opinion. A case of this sort once "came before me, and I consulted with my brothers "upon it, who all agreed that the whole related to the "original debt, and therefore was within the act."

3. In *Scott* v. *Ambrose*, 3d Maule & Selwyn, 326, decided in 1814, "the plaintiffs sued the defendant for a debt, "shortly after which the commission issued against the de- "fendant, and he was found a bankrupt. The plaintiffs did "not come in under the commission, but prosecuted their "action to judgment. The defendant obtained his certificate "and afterwards brought a writ of error in Parliament "upon the judgment, which writ of error was non prossed "for want of assignment of error, and forty pounds costs of "*non pros.* in error awarded against him. The plaintiffs "issued a *fi. fa.* for these costs, and a rule *nisi* was obtained "for setting it aside." The court made this rule absolute.

4. In *Willet* v. *Prindle*, 5 Bosenquet & Puller, p. 190, decided in 1806, the action was brought by an attorney for legal business done previous to bankruptcy. Action brought after bankruptcy and verdict given for the plaintiff before the defendant's discharge but after judgment and verdict he obtained his discharge. The proceeding was a rule to show cause why an *exoneretur* should not be issued upon the bail piece; the defendant being, as was conceded, discharged, except as to costs. The attorney for the claim says: "The "question is whether *both debt and costs* are provable "under the commission, for if provable they are barred "by the certificate, but not otherwise." On the other side it was contended that "The action was not com- "menced until after the commission was issued, and if "creditors are at liberty to bring actions at law against a "bankrupt after commission and subject him to the costs "he may have more costs than the amount of all his debts, "notwithstanding the debts may be provable under the "circumstances, and afterwards barred by the certificate." The court, SIR JAMES MANSFIELD, says: "Where a man "brings an action against a bankrupt, after a commission "is issued, he takes the chance of losing his costs, in case "the debt should be barred by the certificate. I cannot "distinguish the costs from the debt; if the bail are dis- "charged from the one, I think they cannot remain liable "for the other. Rule made absolute."

5. In *Dinsdale, Assignee of the Sheriff of Middlesex*, v. *Eames*, 2d Brod. & Bing., p. 8, decided in 1820, the following are the facts and the decision: On the 3d of June, 1819, the defendant was sued on a bail bond given by him. On the 17th of June he pleaded

to the action; on the 4th of November he became a bankrupt. On the 29th of the next March judgment was entered up upon the bail bond, and the defendant taken in execution. On the same day of his arrest he obtained a discharge in bankruptcy. When the defendant was taken in execution he paid the plaintiff fifty-one pounds towards the damages and costs. Having obtained his discharge, he obtained a rule *nisi* to have this sum restored to him. This rule was resisted by the counsel for the party prosecuting for the following reason: "The question is whether the defendant in an ac-"tion on a bail bond, becoming bankrupt between plea and "verdict, and obtaining his certificate after final judgment, "is discharged from the damages and costs. He is not "discharged, because the debt is not one that can be "proved under the commission; till judgment is given it "cannot be ascertained what is due for costs, either in "the original action or the action on the bail bond."

The court decided that: "the debt was contracted with "certainty before the bankruptcy of the defendant, and "therefore might have been proved under the commis-"sion. The case of *Boteflour* v. *Coats* is directly in "point, and has never been overruled or questioned in "any subsequent decision; and *Scott* v. *Ambrose* has de-"cided that costs bear relation to the original debt. The "rule was made absolute."

6. In *Davis* v. *Shapley*. 1st Barn. & Adolp., 54, decided in 1830, the plaintiff in November, 1829, commenced an action against the defendant for goods sold. In December, 1829, a commission of bankruptcy issued against the defendant, under which he was duly declared a bankrupt, and obtained his certificate, which was allowed on the 29th of April, 1830.

The messenger under the commission seized the defendant's stock in trade as a grocer, and it was sold by the assignees.

After the allowance of the defendant's certificate he resumed business as a grocer and procured a small stock to enable him to carry on business; and for that stock he remained in debt to various persons. The plaintiff obtained a verdict in his action at the Lent Assize for the county of Gloucester. And on the 14th day of May, 1830, taxed his costs and signed judgment in the action, and he afterwards issued a *fi. fa.* for damages and costs, amounting to £76, directed to the sheriff of the county of Somerset. On the 20th day of May the sheriff in virtue of the writ seized several articles of the grocery purchased by the defendant since bankruptcy. A rule *nisi* had been obtained for setting aside the *fi. fa.* and for refunding to the defendant the sum levied and remaining in the hands of the sheriff; that is, the plaintiff brought suit against the bankrupt before his adjudication as a bankrupt and obtained judgment and execution after his discharge as a bankrupt, and having made a levy, motion was made to stay proceedings. The statute, as set up by the attorney for the bankrupt, was as follows: "The "bankrupt shall be discharged from all debts due by "him when he became a bankrupt, and from all claims "and demands thereby made payable under the com- "mission in case he should obtain his certificate, etc. The "original debt in this case was one clearly provable un- "der the commission. The bankrupt will not be dis- "charged from that debt if he continues liable to pay it "out of his subsequently acquired property."

BAYLEY, Judge, says: "The 121st section enacts

"that every bankrupt who shall have conformed himself "to the laws in force concerning bankrupts at the time "of issuing the commission against him, shall be dis- "charged from all debts due by him when he became a "bankrupt, and from all claims and demands by this act "made provable under the commission, in case he shall "obtain a certificate. A bankrupt, therefore, who has "complied with the conditions mentioned in the act, is to be "discharged from all debts due by him when he became "bankrupt. If, after his bankruptcy, his goods were to re- "main liable to be seized and sold, under an order to satisfy "a debt due at the time when he became a bankrupt, he "could not be said to be discharged from that debt. The "enactment is express; I think, therefore, that a creditor, "in respect of a debt due before the bankruptcy, is not at "liberty to sue out an execution against the goods of his "debtor or after the latter has become bankrupt and ob- "tained his certificate." Baron Park in the same case says: "By section 121 of the 6th Geo. IV., as to all debts "which were provable under the commission, the bank- "rupt is discharged, not merely from the debt, but from "*all remedies for the recovery of the debt.* The rule for "setting aside the *fi. fa.* must be made absolute." And LITTLEDALE, J., says: "If the original debt were contracted "after the bankruptcy, it could not be proved under the "commission, and the property of the bankrupt would re- "main liable; but if the debt was contracted before the "commission, it was provable, and the 6th of Geo. IV., "Ch. 16, Sec. 121, says, the bankrupt shall be absolutely "discharged from said debt."

7. *Barrow* v. *Poile*, 1st Barn. & Adolp., 629, decided in 1830.

The plaintiff having entered up judgment against defend-

ant on a warrant, the attorney sued out a *fi. fa.* and levied upon his goods. A rule was obtained to show cause why the *fi. fa.* should not be set aside, and the goods restored upon an affidavit that the defendant had become a bankrupt and had obtained his certificate after the time of the judgment, but before the suing out of the writ; that the goods in question had been acquired by him since the date of his certificate. Lord TENTERDON says: "It is "expressly enacted by the 121st section of the statute, "that every bankrupt who shall have surrendered and "conformed himself, and obtained his certificate, shall be "discharged from all debts due by him when he became "bankrupt, and from all demands provable under the "commission. This judgment debt was clearly so provable. "It is admitted that if an action had been brought on this "judgment, the defendant might have pleaded his bankruptcy and given his certificate in evidence, and that the "certificate would have been conclusive; and also, that if "he had been taken in execution upon the judgment, or "detained in prison upon it, he might have been discharged "by a judge on the production of his certificate, in "which case also it would have been conclusive. * * "* I am of opinion that the rule setting aside execution "and restoring the goods, should be made absolute."

8. In *Humphreys* v. *Knight*, Bingham's Reports, Vol. 6, page 572, decided in 1830, the defendant was in prison in discharge of his bail, Wild Serjt. contended that the defendant ought to have pleaded his certificate *puis darrein continuance*, and could not be discharged on a summary application. The act having specified a case in which the bankrupt is to be discharged summarily, it may be inferred that in cases not specified he must be put to his

plea. Section 126 gives the discharge on summary application, where the judgment has been obtained before the allowance of the certificate. Here it was not obtained till after; and the 121st section only discharges the bankrupt subject to the provisions of section 126.

TINDAL, J., says, page 573: "The court will decide "on principle to be drawn from section 121. The pre- "ceding part of the statute having taken from the bank- "rupt all his property, the 121st enacts, 'that every "bankrupt, who shall have duly surrendered, and in all "things conformed himself to the laws in force concern- "ing bankrupts at the time of issuing the commission "against him, shall be discharged of all debts due by him "when he became bankrupt, and from all claims and de- "mands hereby made provable under the commission, in "case he shall obtain a certificate of such conformity, so "signed and allowed, and subject to such provisions as "hereinafter directed; but no such certificate shall release "or discharge any person who was partner with such "bankrupt at the time of his bankruptcy, or who was "then jointly bound or had made any joint contract with "such bankrupt.'"

"The provision of this section acts as a complete dis- "charge from the time the certificate is granted. Here he "had no doubt an opportunity of pleading his certificate "*puis darrein continuance:* but as he might have obtained "relief on *audita querela*, the court may interpose sum- "marily."

If there is any other English case, or any English case in which a contrary doctrine is maintained, it has escaped our attention.

In the case of *Imlay* v. *Carpenter*, 14th Cal., decided in

173, speaking of the English cases, the court (on p. 175) says:

"It is, however, the settled doctrine of the English "courts, that a judgment recovered against the bankrupt "after the issuance of the commission, and before he ob- "tains his discharge, and upon a pre-existing indebted- "ness, occupies the exact position of the original debt, and "is equally within the purview and operation of the dis- "charge." He then quotes from, with approval, the cases just previously herein cited, and says:

Our own Supreme court in its opinion in this very case, 105 Ill., 627, in reference to the uniformity of the English decisions upon this question, says, page 632:

"We have been referred to a large number of cases "decided in England, where the courts hold that a judg- "ment rendered against a bankrupt after he was declared "a bankrupt, and before the final discharge was obtained, "upon a pre-existing debt, is released by the discharge. "Among the number is *Blanford* v. *Foot*, 1 Cowp., 138, "which is a leading case on the subject. We do not ques- "tion the rule in England. It is uniform; but the decis- "ions in England cannot be relied on as authority here, "for the reason that they are predicated upon a provision "in the statute of that country, which does not exist in "our bankrupt law. The substance of the statute is that "if the creditor did obtain judgment before final dis- "charge and take the debtor in execution, he should be "discharged on motion."

CASES UNDER THE ACT OF 1841.

1. In *Graham et al.* v. *Pierson*, 6th Hill, 247, found on page 12, *ante*, and decided in 1843, the case was where *judgment was obtained October 20, 1841, and Graham adjudicated a bankrupt in February, 1842. In June, 1842, he obtained his discharge.* He then made a motion for a perpetual stay of the proceedings on the judgment and execution.

The court say, page 248: "The judgment which "the plaintiff recovered against Graham for costs was "a debt provable under the bankruptcy act, and is "consequently reached by the discharge. If the de- "fendant chooses to bring a suit on the judgment, Gra- "ham can then plead his certificate. But so far as relates "to the execution now in the sheriff's hands, or any other "execution to be issued on the judgment, Graham has "no means of availing himself of the discharge except "by motion. He is, therefore, entitled to perpetual stay "of execution."

2. In the case of *McDougal* v. *Reid et al.*, decided in 1843, in 5th Ala., 810, the facts are given sufficiently in the opinion. The Supreme court say, on page 811:

"The only question, then, which remains, and the only "one which it is probable was intended to be raised in this "court, is, what is the effect of a decree in bankruptcy "upon a debt in suit, or *upon judgment obtained against a* "*debtor, pending his application for a discharge from his* "*debts under the bankrupt law?*

"The bankrupt law declares that every bankrupt who

"shall *bona fide* surrender all his property, and rights of "property, with the exception beforementioned, for the "benefit of his creditors, and shall fully comply with and "obey all the orders and directions which may, from time "to time be passed by the proper court, and shall otheriwise "conform to all the requisitions of this act, shall * * * "be entitled to a full discharge from all his debts, to be "decreed and allowed by the court which has declared "him a bankrupt, and a certificate thereof granted by "such court accordingly, upon his petition filed for such "purpose; such discharge and certificate not, however, "to be granted until ninety days from the decree of bank-"ruptcy, etc.; and such discharge and certificate, when "duly granted, shall in all courts of justice be deemed a "complete discharge of all debts, contracts and other "engagements which are provable under this act, and "shall and may be pleaded as a full and complete bar to "all suits brought in any court," etc.

"During the present term we have held that the filing "of a petition for the benefit of the act, did not arrest the "progress of a suit for a debt due by the petitioner; be-"cause, until the decree in bankruptcy, it could not be "known whether he would be discharged from the debt; "but the decree when made in conformity with the stat-"ute, by operation of law, at once discharges the bank-"rupt from his debts, whether reduced to judgment or "not. The judgment being discharged, the lien of the "execution is gone, and could no longer sustain the levy "made while it was in force. The court, therefore, did "not err in quashing the levy. It appears, also, that the "court quashed the execution; but this was a mere act of "supererogation, and could not prejudice any one."

See also *Ewing* v. *Peck*, 26 Ala., 413.

3. The case of *Rogers* v. *The Western Marine Fire Ins. Co.*, 1st La. An. Rep., 161, decided in 1846, and was the case of *a judgment obtained after adjudication in bankruptcy, and before discharge.* The court say, page 162: "The discharge in bankruptcy was, "in our opinion, a full and complete bar to the debt, "and consequently to the further action on the insur- "ance by *fi. fa.* The debt due to him existed at the "time of the institution of the bankrupt proceed- "ings. It was provable in bankruptcy. It was not "such a debt as is excluded from the operation of "the statute, if the creditor chose to stand aloof. It "is immaterial, as regards the effect of the discharge, that "all the debts due to the creditor were not stated in the "schedule, and that the company did not make itself ac- "tively a party to the bankrupt proceedings by taking a "dividend or otherwise. There is no allegation, or proof, "of any fraud, or other matter which would impeach, as "to this creditor, the validity of this discharge.

"The proposition that Rogers should have pleaded the "pendency of the bankrupt proceedings in the original "suit, and cannot disturb the execution of the judgment "which is final, is untenable. The discharge in bank- "ruptcy was posterior to the rendition of this judgment, "and operated with the same force upon the debt after it "assumed the form of a judgment, as it would have "done had the debt remained in its original form of a "promissory note."

4. *Curtis* v. *Slosson*, 6 Penna. St., 265, GIBSON, J. C.: decided in 1847.

Judgment confessed on bond in 1840.

Judgment opened in 1842 to let in matters of proof by the defense alleged in his affidavit.

Petition in bankruptcy, 1843.

Final judgment against bankrupt, April, 1845.

Certificate of discharge in bankruptcy, May, 1845.

* * * "The judgment * * * was discharged "by the defendant's bankruptcy. * * * * As the "writ of *audita querela* is not in use with us, what could "he do? Certainly no more than wait till he should be "molested by having his subsequently acquired property "seized in execution. That event soon occurred; and as "the conclusiveness of the certificate of bankruptcy super- "seded the necessity of a trial by jury, the court very "properly relieved him summarily, by quashing the exe- "cution."

Citing:

Cullin's Bankruptcy Law, 105.
11 Vesey, 649.
Cowper, 25, 138.
Eden's Bankrupt Law, 413.

5. In the case of the *Mechanics' Banking Association* v. *Lawrence*, 1st Sanford's N. Y. Rep., 658, decided in 1847:

"This was an action of assumpsit commenced by a ca- "pias on the 1st day of May, 1840. *Issue is joined and* "*on the 9th of November, 1841, a verdict was rendered* "*for the plaintiff.* The defendants made a case, and their "motion for a new trial being denied, *judgment for the* "*plaintiff was finally entered October 17, 1842*, and "adopted on that day in the county of Kings, where the

"defendants resided. *On the 26th day of February, 1842,* "*the defendants filed their petition in bankruptcy* under "the act of Congress, of August 19, 1841. The plaintiff's "debt was set forth in the schedule accompanying their "petition. *They were decreed to be bankrupts on the* "*17th of November, 1842: and they received a final* "*discharge from their debts in the United States district* "*court, on the 7th of July, 1843.* The defendants now "present a petition stating that the plaintiff's debt was "discharged by the bankrupt proceedings, but that the "judgment is still uncanceled and remains an apparent "lien upon any real estate which the defendants have or "may hereafter purchase, and is a cloud upon their "title; that they have applied to the plaintiff to cause the "judgment to be canceled, or in some way to remove its "lien: which was declined, and an execution is about to "issue, they therefore pray that against the defendants "all proceedings on the judgment be perpetually stayed, "and the judgment vacated and canceled of record."

BY THE COURT: "The facts show that the discharge "could not have been pleaded in the suit; and the defend- "ants now apply, first, to cancel the judgment; or sec- "ond, for perpetual stay of execution. As to canceling "the judgment, we do not find any case which has gone "so far, and we think it should not be done. The judg- "ment should be permitted to stand, as well to enable the "plaintiff to enforce it against real estate on which it may "have become a lien prior to the decree in bankruptcy, "as to enable him to test the validity of the discharge.

"The other branch of the application should be granted, "in respect of all property acquired by the defendants "since they were decreed to be bankrupts, otherwise the "defendants will never be able to avail themselves of the

"benefit of their discharge against this debt. There are "several instances reported here and in England, both in "bankruptcy and insolvency cases, where the courts have "thus stayed execution. The motion for perpetual stay "of execution is granted."

6. The case of *Harrington* v. *McNaughton*, 20th Vt., 293, decided in 1848, was one wherein McNaughton *was declared a bankrupt on August 1, 1842, and obtained his discharge February 6, 1843. At the December term, 1842, Harrington recovered a judgment*, and the question which was decided was whether the discharge in bankruptcy was a bar to the judgment. The court in their opinion say, p. 295:

"There does not appear, from the authorities, to be any "doubt, but the bankruptcy certificate, in England, is a "bar to a debt upon which a judgment has been recovered "pending the proceedings in bankruptcy, and before the "granting of the certificate in, all cases, where the debt "would be otherwise provable under the commission.

* * * * *

"The bankrupt may also be discharged on motion, "either before or after the judgment, and he is, in both "cases, discharged from the debt and costs. * * * "The certificate is but the evidence, that it was then dis- "charged; and the costs being founded upon a discharged "debt, partake of its character, and do not constitute a new "ground of claim against the bankrupt. * * *

(P. 296) "All the property of the bankrupt belonging "to him at the time he is declared a bankrupt, imme- "diately vests in the assignee, for the benefit of his credi- "tors: and it seems most consistent with a just distribu- "tion of his estate among his creditors, which is a leading "object of the statute, that all debts then existing should

"be provable against it, and consequently be barred by "the certificate."

"In the well-considered case of *Dozoner* v. *Brackett*, in "the district court for the Vermont district, it is said by "Judge PRENTISS, that all debts existing before and at the "time of the decree of bankruptcy are provable under the "bankruptcy, and all debts up to that time are barred by "the certificate of discharge. (5th Law Reporter, 399.) "This seems to us to be the reasonable construction of the "statute, so far, at least, as relates to bankrupts who be-"come such on their own petition, and as it sufficiently "appears from the pleadings in this case, that the debt, "upon which the plaintiff's judgment was founded, was "an existing debt against the defendant, when he was de-"clared a bankrupt, we think the certificate is a bar to "recovery upon it."

They treat the bankrupt as the legal owner of the property up to the issue of the decree, and tie down the title of the assignee to that time, so as to preclude its relating back. All the property then owned by the bankrupt passes and vests in the assignee, and consequently all debts existing before and at the date of the decree are provable under the bankruptcy, and all debts up to that time barred by the bankrupt's certificate of discharge.

7. In *Turney* v. *Gatewood*, 8 B. Monroe, 613, decided by Chief Justice MARSHALL in 1848:

"The object and effect of the bankrupt law of the U. "S. is to operate as a discharge of the bankrupt from all "debts proved and provable in the case, upon the bank-"rupt obtaining a certificate of his discharge."

"The pendency of a proceeding in bankruptcy is no bar "to the obtaining of a judgment and execution, but the "state courts may enjoin the proceedings against property "acquired after the decree in bankruptcy."

8. In *Blake* v. *Bigelow*, 5 Ga., 437, decided 1848, the court say, p. 438:

"The certificate of the bankrupt is made conclusive "evidence in all courts of justice, of a full and complete "discharge of all debts, contracts, and other engagements "of the bankrupt, unless impeached for fraud. A judg- "ment is a debt of record, and, consequently, the defend- "ant, Blake, was discharged from the payment of all "judgments obtained against him, prior to his obtaining "his certificate of bankruptcy."

9. In the case of *Johnson* v. *Fitzhugh*, 3d Barbour's Ch. Rep., 372, decided in 1848, Fitzhugh *was adjudicated bankrupt on the 20th day of February, 1843, and obtained his discharge on the 5th day of June in 1843.* Upon the 3d of February, 1843, the complainants, Johnson and Clark, filed their bill against Fitzhugh and wife to foreclose a mortgage previously given by them. *In April, 1843, a decree of foreclosure and sale was entered, and a decree over against Fitzhugh for the deficiency was entered; the amount of the deficiency was about $5,000.* Fitzhugh did not know of the decree, and the vice-chancellor refused to set aside the docket of the judgment, from which decision the case was appealed, and the chancellor in his opinion says, p. 372:

"Where a decree is actually made before the discharge "of the defendant, under the bankrupt act, for the pay- "ment of a debt which was contracted before the pro- "ceedings in bankruptcy were instituted, such debt may

"be proved under the proceedings in bankruptcy, and the "discharge of the defendant is a complete bar to any suit, "or other proceeding, upon the decree to charge defend- "ant personally with the debt: unless the discharge can "be successfully impeached, for some of the causes speci- "fied in the bankrupt act." * * *

(P. 373): "In ordinary cases, however, although a judg- "ment technically changes the nature of the debt, it is still "in fact the same debt which was due at the commence- "ment of the suit; and if contracted previous to the insti- "tution of the proceedings in bankruptcy, it will be barred "by the discharge, where such discharge is obtained "subsequent to the entry of the judgment."

10. In *Peatross* v. *McLaughlin*, 6 Grattan (Virginia), 64, decided in 1849, on application to dissolve injunction, the court say, p. 65:

"It appearing that from the statements in the bill, that "the judgment enjoined had been discharged by the pro- "ceedings in bankruptcy therein alleged, it was competent "for a court of equity to relieve the appellant against the "suing out or levy of any process of execution upon said "judgment."

11. In the case of *Cogburn et al.* v. *Spence*, 15 Ala., 549, decided in 1849, the court hold, p. 554: "If "the demand of the creditor was reduced to judg- "ment, before the certificate was granted, the act "does not compel him to bring an action of debt on "the judgment, in order to test the question, whether "the certificate of discharge is a bar to his demand or "not; and as he is not compelled to sue again on his "judgment, he may proceed with his suit as it stood "before the certificate was granted, and issue his execu-

"tion, at the risk, however, of having it set aside, or "quashed by an application to the court on the part of "the bankrupt. This seems to be the natural construc- "tion of the act, and accords with decisions made upon "this subject. * * *

"There being then a judgment, to which there are "proper parties, and upon which the plaintiff may pro- "ceed, until arrested by the act of the bankrupt, the exe- "cution issued thereon is not absolutely void, but voidable "only. That is, it is a valid writ until the bankrupt "shows it to be erroneous. * * *

"It has, however, been urged, with much force, that "this construction of the bankruptcy act, will, or may fre- "quently deprive the bankrupt of that full protection, in- "tended to be secured to him; for if the writ is voidable "only, and not void, and if the sheriff should sell before it is "set aside, the title of the purchaser would be complete, "and thus the defendant divested of his property, when "he had a full discharge from the debt. The answer "must be, that the act designed to furnish the bankrupt "with a full defense against all his debts, save those ex- "cepted by the act, and if before he has had an oppor- "tunity to make this defense, he has been injured by the "act of the plaintiff, through the medium of the process "of the court, the law will give him redress by way of "damages, after he has shown to the court that the pro- "cess is erroneous."

12. In the case of *Clark* v. *Rowling*, 3d Com., 216, decided in 1850, it is held that *a discharge in bankruptcy under the late act of Congress operates upon a judgment which is obtained against the bankrupt between the time of the commencing of proceedings and the*

granting of the discharge where the judgment is founded upon a debt existing at the time the proceedings were commenced, accordingly, where a creditor brought suit against his debtor, and pending the suit the debtor instituted proceedings to be discharged as a bankrupt, but the discharge was not obtained until after the judgment was recovered; held that the discharge was a good defense to the bill in equity subsequently filed by the creditor for the purpose of collecting the judgment out of the equitable property of the debtor. In this case it was insisted that the old debt had merged in the judgment, and that the judgment was a new debt and not provable at the time of the adjudication. This is a leading case on this subject, and is followed by many of the cases mentioned in this brief.

The court, on p. 220, says: "It is true that the notes, "as evidence of indebtedness, were merged in the "judgment; which, being greater security, operated to "extinguish the lesser; but does it therefore follow that "the judgment to all intents became a new debt, and that "the merger or extinguishment of the notes was so com-"plete, as that for the purpose of protecting the defend-"ants in an equity connected with their original indebted-"ness, we may not look behind the judgment and see "upon what it was founded? A judgment, instead of "being regarded strictly as a new debt, is sometimes "held to be merely the old debt in a new form, so as to "prevent a technical merger from working injustice. "And this exception to the doctrine contended for by the "plaintiff has obtained, especially in cases of insolvency "and bankruptcy, for the protection as well of the "creditor as the debtor, and has been applied impartially "for the benefit of both."

13. In *Fox* v. *Woodruff*, 9 Barb. Rep., 498, decided in 1850, the court decided that *a debt existing when the bankrupt filed his petition, but upon which judgment was recovered before his discharge was barred by such discharge.*

The court say, page 499: "That in such a case, "where the judgment is founded on a note, bond, or "other demand which was itself a debt when the de- "fendant's petition in bankruptcy was filed, the original "debt is not merged in, or extinguished by, the judgment, "so as to be exempt from the operation of a discharge "afterwards granted."

14. In *Dick* v. *Rozell*, 2 Swan., (Tenn.) 632, decided in 1853, judgment was rendered after adjudication of bankruptcy and before discharge.

The bankrupt asked for a writ of supersedeas to stay collection of a debt. It was contended, first, that the judgment being rendered after adjudication in bankruptcy was a new debt not provable at time of adjudication.

In regard to this point the court, on p. 637, say: "We "do not consider judgment rendered on the note as a new "debt, it is a new security given by the act of the law for "the same debt. * * *

Second, it was contended that because the bankrupt did not defend the suit he ought not to be relieved from the judgment.

On this point, on p. 537, the court says:

"It must be clear that the bankrupt is not precluded "by the judgment unless by a plea he could have pre- "vented its recovery, but the institution and pendency of

"his suit in bankruptcy was no matter in bar to the con-
"traction of the debt. * * Nothing short of the cer-
"tificate could be good in bar, and this was not obtained
"until after the judgment was rendered. *Lummus* v.
"*Fairfield*, 5 Mass., 250."

Third, it was contended that the bankruptcy court could, on petition of the bankrupt, have enjoined the prosecution of the suit against him until the question of the discharge could be determined.

The court, on p. 637, say: "The omission of the "bankrupt to apply for the injunction cannot effect "the nature of the case, for if it was a proper case for "an injunction, it was the duty of the plaintiff after notice "of the suit in bankruptcy, to suspend further action "without the necessity of legal restraint, and their failure "to do so was in some sense a wrong from which they "cannot be allowed to take any benefit."

15. In the case of *Downer* v. *Rowell*, 26th Vt., 397, decided in 1854, the court say, p. 400:

"In the case of *Harrington* v. *McNaughton*, 20th Vt., "293 (under the act of 1841), it was held that *the certifi-*
"*cate of a bankrupt is a bar to an action upon a judgment*
"*recovered pending the proceedings in bankruptcy, and*
"*before the granting of the certificate, where the debt for*
"*which the judgment was rendered, was due at the time*
"*of the decree in bankruptcy.* These are the facts set up "in this plea, and are admitted by the demurrer. The "judgment, therefore, upon which the plaintiff has de-"clared, must be considered as barred by this certificate."

16. In the case of *McDonald* v. *Ingraham*, in the 30th Miss., on page 389, a case where the same point

was in issue, and decided in December, 1855, the court say, p. 394:

"It is conceded by the counsel for the defendants in "error, that if the judgment at law could be regarded as "the same debt existing against the bankrupts when they "filed their petition for the benefit of the bankrupt act, the "debt would be extinguished by the final discharge. But "it is said, that by the judgment the old debt was merged, "and a new debt thereby created, which had no existence "when the proceedings in bankruptcy were instituted, and "which, therefore, not being provable, was not affected by "the discharge in bankruptcy.

"We do not think that this position is well founded. "It is certainly true, that the bankrupts were discharged "from the debt in the form in which it stood at the time "when they filed their petition in bankruptcy, and that if "the final discharge had been granted before the suit at "law came on for trial, the discharge would have been a "complete bar to the recovery, but the discharge had not "then been granted, and it was therefore beyond the "power of the parties to avail themselves of it as a de-"fense. * * * *

"Can it be said, then, that the judgment became a new "debt, wholly disconnected with the original debt, so that "it would not be affected in any manner by any consider-"ation connected with the original debt? We think not. "A debt is said to be merged, when its original form is "changed into a form importing higher dignity. * * * "But the essential difference between such contract in its "original form and its new form, consists in two par-"ticulars; the first having reference to the legal effect of "the new contract *in point of evidence*, as a bond import-"ing of itself to be on sufficient consideration, or a judg-

"ment being *prima facie* a conclusion of any defense "which could have been made to the action in which it was "rendered; and the second having reference to its *operative* "*force*, as a judgment being capable of enforcement by "execution. But the form into which the debt may be "changed, cannot change its substantial nature, and impart "to it legal efficacy, when it had not sufficient ground to "support it in its original form. * * * Hence, though "the old debt be merged in the new one, it does not "create a new contract severed and absolved from its "original consideration. * * * It is not denied that "the debt on which the judgment in this case was founded, "was discharged by the certificate in bankruptcy; and it "is therefore clear that the judgment has no legal or "equitable consideration to support it, and should not be "enforced in a court of equity."

17. In the case of *Imley* v. *Carpentier*, reported in the 14th Cal., on page 173, and decided in 1859, was where a judgment was rendered against an insolvent between the date of his adjudication and his discharge. The court say, p. 174: "The question to be first disposed of, relates "to the effect upon this judgment of the discharge of the "plaintiff as an insolvent debtor. The statute limits the "discharge to such debts and liabilities as were owing at "the time of the application, and named in the schedule "attached to the petition; and it is contended that this "judgment is not within the operation of the discharge "for the reason that it did not exist at the time of the ap- "plication, notwithstanding the debt upon which it was "recovered was specially set forth in the schedule, and "included in the discharge. * * It is, however, the "settled doctrine of the English courts, that a judgment "recovered against the bankrupt after the issuance of

"the commission, and before he obtains his discharge, upon "a pre-existing indebtedness, occcupies the exact posi- "tion of the original debt, and is equally within the pur- "view and operation of the discharge. *Blandford* v. "*Foot*, 1 Cowp., 138; *Bouteflower* v. *Coates*, 1 Cowp., "25; *Dinsdale* v. *Evans*, 2 Bro. & Bing.; *Scott* v. *Am-* "*brose*, 3d Maule & Selw., 326; *Willett* v. *Prindle*, 5th "Bos. & Pul., 193.

* * * * * * *

"If there is any English case in which a contrary "doctrine is maintained, it has escaped our attention. "In this country a similar question has frequently "arisen in the different State courts, and while the de- "cisions have not been uniform, the preponderance of "authority is largely in favor of the English rule. * * "* * * We conclude, therefore, that the plaintiff is "entitled to relief."

Cases Under the Act of 1867.

1. In the case of *Cornell* v. *Dakin*, 38 N. Y., 253, decided June, 1868, set out on page 13, *ante*, it is held, the discharge of the debtor under an act of bankruptcy is not a bar to an action in any stage unless it is pleaded, and where the discharge is obtained too late to be pleaded, either originally or by amendment, the remedy is by motion for perpetual stay of execution.

2. In the August number of the *Jurist* is an article from which we make abstracts:

"It is said in *Chambers and Garner* v. *Neal*, 3d B. "Monroe, 257, that *audita querela* was the ancient rem- "edy where the matter of discharge happened after the

"recovery of the judgment, and a defendant was in exe-
"cution or danger thereof. It seems now, however, that
"wherever *audita querela* would lie at common law, re-
"lief may be obtained *on motion, and this remedy by mo-*
"*tion*, in most of the states, has rendered the remedy,
"*audita querela*, useless, and driven it out of practice. 3d
"Blackstone's Com., 406, and note, *Chambers & Garner*
"v. *Neal*, *supra*.

"Perhaps in some of the states and in England, in
"cases of doubt as to the right of relief, if the facts are
"disputed, resort may still be had to the writ of *audita*
"*querela*, but it seems to us that the better and more con-
"venient practice is the summary method of application
"to the court by motion, upon reasonable notice to the ad-
"verse party. * * *

"The remedy *audita querela* having fallen into disuse,
"the same practice has been adopted of giving relief on
"summary application, where the person or property of
"the bankrupt is taken under process issued on a judg-
"ment upon which the discharge operates, and the rem-
"edy is in the court out of which the execution issued. If
"the goods of a certified bankrupt acquired after his
"bankruptcy are seized under *fieri facias*, issued on a
"judgment in respect of a debt due before the bank-
"ruptcy, the court, on motion will set aside the execu-
"tion. *Davis* v. *Shapley*, 1 B. & Ad., 54. *Barrow* v.
"*Doyle*, 1 B. & Ad., 629. *Humphreys* v. *Knight*,
"6 Bing., 572. *Alcott* v. *Avery*, 1 Barb., C. R., 347."

"Mr. FREEMAN, on the Enforcement of Judgments
"Against Bankrupts, 37, says:

"'Unquestionably, the safest course for a discharged
"bankrupt, having judgments ostensibly in force against
"him, is to take some affirmative action for the purpose

"of securing the benefit of his discharge.' See *Coyburn* "v. *Spence*, 15 Ala., 549; *Borden* v. *Jaco*, 17 Ala., 344; "*Westenberger* v. *Wheaton*, 8 Kan., 169. 'The theory of "some of the courts is, that the process is voidable and "not void; and in the case of *Westenberger* v. *Wheaton*, "*supra*, the Supreme court of Kansas held that the "defendant could not maintain replevin. And the most "summary and convenient action is, by motion in the "court where the judgment was rendered for a perpetual "stay of execution, seems to us an adequate remedy.'

"In Murphy v. Smith & Nicholson, 22 La. An., 441, "(decided in 1870, under the act of October, 1867,) the "court of chancery was invoked, and it was there held "that a personal judgment against the party discharged in "bankruptcy is without any legal force, and will be en- "joined, and we have no doubt that the bankrupt may "proceed by motion or by injunction, especially where the "plaintiff is taking measures to enforce the judgment. It "will be noticed that by the English statute the creditor "may in a proceeding by motion, and we have no doubt, in "chancery, attack the discharge for fraud. But it seems, "under the bankrupt law of this country, that the mode "of attack is pointed out by the act of Congress, and the "discharge cannot be attacked in a collateral proceeding. "(See Bump's Practice, 9th Ed., 285; U. S. Stat., Sec. "5,120.)

"By this section the impeaching tribunal is specified, "and the power to pass upon the question of the validity "of the discharge vested in the district courts. The au- "thority of Congress over the subject is paramount to the "state authority, and the rule is now settled in this coun- "try, that a discharge duly granted when pleaded in an "action, either in the State courts or in the courts of the

" United States, cannot be impeached. (See note to Sec. " 5,120, *supra*; Bump's Bankruptcy, 9th Ed., 759, and au- " thorities cited. (It must, however, be borne in mind that " there is a certain class of liabilities excepted from the " operation of the discharge. In the case of joint debtors " the discharge of one will not affect the others. (See 33 " Bankrupt Act.) And in the case of the judgment being " joint, it is necessary to the validity of the execution, that " it should conform to the judgment. (1 Archibald's " Practice, 283; *Linn & Decker* v. *Hamilton & Wood*, 34 " N. J. Law, 305.) But the bankrupt debtor is entitled " to have the execution stayed so far as it affects his prop- " erty.

" From this brief summary of the law, it seems that " the discharge may be pleaded at any time up to the ren- " dition of the final judgment, and that after the judgment " process on the judgment may be perpetually stayed on " motion or by injunction, and that any creditor attempt- " ing to revive an execution upon such judgment will be " liable as a trespasser, whether he knew of the exist- " ence of the discharge or not, and that the better prac- " tice is for the bankrupt to proceed affirmatively, either " by motion or injunction in the court where the judgment " remains."

3. *In re Stephen Brown*, decided February, 1870, 3d National Bank Register, page 585.

In this case Lisk, a creditor of Brown, commenced suit on the 26th day of December, 1869. On the 21st of December, 1869, five days prior to the commencement of the suit, Brown was adjudicated bankrupt, and on the 19th day of January, 1870, a judgment was recovered against Brown for $270.50 and costs. The debt upon which the

judgment was obtained existed at the date of the adjudication, and the question presented to the court was whether the suit and judgment divested the debt of its provable quality in the bankruptcy proceedings, or whether the debt was merged in the judgment and created a new debt which did not exist at the time of the adjudication. Upon this question the court, BLATCHFORD, J., says:

"I have examined the decision of the District court for "the District of Connecticut in the case of *in re* Williams, "2 Bankruptcy Register, 229, and am compelled to dissent "from it. The point ruled in it is that where judgment "is recovered against the bankrupt, after an adjudication "of bankruptcy against him on the debt which existed "against him prior to such adjudication, the debt is so "merged in the judgment that it cannot be proved in "bankruptcy, and a judgment cannot be proved because it "was not an existing debt at the time of the adjudication. "The theory is that the debt was so merged as to be ex-"tinguished, and that the judgment constitutes a new "debt, which takes date from the time of its recovery. "There is no doubt of the correctness of this principle "as respects proceedings in ordinary cases against the "debtor or his property, but it has no applicability under "the bankrupt act. *The 19th section of the act declares "that all debts due and payable from the bankrupt at the "time of the adjudication of bankruptcy, and all debts then "existing but not payable until a future day, may be "proved against the estate of the bankrupt.* If the debt "in this case existed at the time of the adjudication, it is "provable, although the judgment is not provable as such, "because it did not then exist. The debt has never been "paid or satisfied. This must be the proper construction

"under the act, or the provisions of section 21 of the act "are nugatory. That section provides that when a suit "is pending by a creditor against the bankrupt for a debt "or claim, if the amount due the creditor on or for the "debt or claim is in dispute, the suit may, by law of "the bankruptcy court, proceed to judgment for the pur- "pose of ascertaining the amount due on or of the debt "or claim, and that such amount may be proved in bank- "ruptcy. The judgment, as such, is not to be proved, "but the amount of the debt or claim as it stood at the "time of the adjudication, is to be proved. If the fact of "obtaining the judgment extinguishes the debt, the "amount of the debt could not be proved. I think the "clear intent of the act is that the recovery of a judgment "after the adjudication on a debt which existed at "the time of the adjudication, shall not affect the "provability of the debt. If it were otherwise, a "great hardship would be worked in many cases. "A creditor might, in ignorance of the adjudication, go on "and obtain a judgment for his debt and find himself de- "prived of the power of proving either his debt or his "judgment. I think the debt in this case, if it existed at "the time of the adjudication, is provable."

In *re* Vickery, reported in the 3d National Bankruptcy Register, on page 696, and decided in 1870, under the act of 1867, in which judgment was rendered after adjudication and before discharge, WITHEY, Judge of the United States court in the Western division of Michigan, in his opinion, says p. 697:

"I dissent entirely from the rule laid down *in re* Will- "iams, 2 National Bank Register, 229, and fully con- "cur in the decision *in re* Brown, 3 Nat. Bank. Register, "page 585. The debt in the case reported by Register

"Burns existed at the time of the adjudication of bank-
"ruptcy, and if it has never been paid or satisfied may be
"proved in bankruptcy.

"The fact that judgment has been rendered for the
"debt, is neither payment nor satisfaction thereof in any
"sense which prevents proof of the debt in bankruptcy.
"It is not the judgment, but the debt as it existed on the
"day of the adjudication, that is provable."

3 N. B. R., 171.

4. In *re* Crawford, 3 N. B. Reg., 698, decided in 1870, by J. W. LONGYEAR, District Judge in the Eastern district of Michigan, the court held p. :

"I must also dissent from the opinion of Judge Ship-
"man, District Judge for the district of Connecticut,
"*in re* Williams, 2 Nat. Bankruptcy Register, 229.
"Judge SHIPMAN there says: 'The debt, therefore,
" * * * was extinguished by the judgment. It no
"longer existed. The judgment itself constitutes a
"debt; but it had no existence at the time of the adjudi-
"cation of bankruptcy, and is not therefore provable
"against the bankrupt's estate.' The whole difficulty in
"the application of this doctrine of merger by judgment
"to a case like the present, originates in a mistaken theory;
"and that theory is advanced in the first sentence of the
"language of the learned judge above quoted, viz., that
"the debt is extinguished by the judgment. The debt is
"not extinguished. The instrument, contract, or obliga-
"tion upon which the debt arose is extinguished, but not
"the debt. The debt remains. If this were not so, the
"judgment would destroy itself by extinguishing the very
"foundation upon which it is built. The debt was
"founded on the contract. It is now founded on judg-
"ment, but it is nevertheless the same debt. A judgment

"operates to extinguish a debt only when it produces the "fruits of a judgment. See the *Bank of the Metropolis* "v. *Guttschlick*, 14 Pt., 19, 32; *U. S.* v. *Hoyt*, 1 Blatch., "Chaps. 326, 328, 329; *Clark* v. *Rowling*, 3 Com., 216.

"The judgment operates as a change of remedy "merely; it is a security of a higher nature than before; "it is still but a security for the original cause of action. "*Drake* v. *Campbell*, 3 East, 258, 259.

"Again, it is often permitted in equity, and sometimes "at law, for particular purposes, to inquire into the claim "or debt upon which the judgment is founded, not as a "means of enforcing the claim anew, but of showing the "relations of the judgment and the judgment creditor "to other things and persons. For instance, in the case "of an attempt to enforce collection of a judgment against "property alleged to have been conveyed in fraud of "creditors, the judgment may not have been rendered until "after the conveyance, in which case, so far as the "judgment shows, the judgment creditor was not a credi-"tor at all at the time of the conveyance, and therefore "could not have been defrauded. In such cases the judg-"ment creditor is always allowed to go back of his judg-"ment, and prove the claim or debt upon which it is "founded; and if it appears that such claim existed at the "time of the conveyance, the judgment creditor's relation "of creditor will for this equitable purpose be allowed to "relate back to that time, although it was anterior to the "rendition of the judgment. Here the judgment credi-"tor is allowed to show that the debt upon which the "judgment was founded existed at a certain time, in order "to establish his right to attack the validity of the con-"veyance as against the judgment, and to have the judg-"ment satisfied out of the property conveyed. * * *

"The criterion is that the debt existed at the time of "filing the petition, no matter whether the security or "remedy has been changed or not, or in what form it may "exist at the time it is presented; if it, the debt, existed at "the proper time, it is provable.

"It will be seen that I arrive practically at the same "result as the learned district judge for the Southern dis-"trict of New York, in *in re* Brown, 3 Nat. Bankruptcy "Register, although by a somewhat different route. * * * "The debt or claim as it stood at the time of filing the "petition, is merged in the judgment, and therefore the "judgment must be proved, if anything; and I hold that "the judgment is provable, not because it existed at the "proper time, but because the debt constituting the found-"ation, the soul, the essence of the judgment, did exist at "that time.

"By taking this view of the subject, all difficulties van-"ish. Every person will receive what justly and equita-"bly belongs to him, without violating any principle of "law or equity, or unsettling or disturbing any established "doctrine, or coming in conflict with any of the provisions "of the bankrupt act. If the bankrupt receives his final "discharge, the judgment, being the thing directly acted "upon by the bankruptcy proceedings, will be as effectu-"ally extinguished as if it were discharged upon the rec-"ords of the court; and if he does not receive his dis-"charge, the judgment will, of course, be satisfied to the "full extent of the dividends which shall have been paid "upon it."

5. *In re Stephens*, decided in 1871, and reported in the 4th N. B. R., on page 369, it was shown that seven of the creditors of the bankrupt did, between

the 17th and 24th days of September, 1870, sue out attachments against the bankrupt and attach his property, and after the bankrupt had filed his petition and was adjudicated a bankrupt they took judgments in their suits against him for the amounts of their debts. The question arose before the register whether those debts were provable, and he certified the question to Judge Blatchford, of the United States District court, who held that the claims were properly provable, and sustained the ruling *in re Brown*, 3 N. B. R., 585, and the same court again affirmed the decision in the case of *in re Rosey*, 8 N. B. R., 509. And this judgment was affirmed by Judge Hunt, Justice of the United States Circuit court for the Southern district of New York, on appeal in the case of *Barnes* v. *United States*, 12 N. B. R., 526.

6. In the case of *Monroe* v. *Upon et al.*, 50 N. Y., 596, decided in 1872, it is held, p. 596: "But it is "claimed that the discharge in bankruptcy is not "operative against the judgment of the plaintiff. The "discharge which is granted is not against any debts but "such as are by the act made provable against the estate "of the bankrupt, and which existed on the day on which "the petition was filed.

"The judgment did not exist on the day on which the "petition was filed. It is not discharged if it is a new "debt. The plaintiff claims that it is; and that his original "claim is completely merged in it. But the authority in "this state is against him. *Clark* v. *Rolling*, 3d N. Y., "216, and the cases there cited, where it is held that, for "such a purpose as this, it is not merged so as to be extinguished. And see *Dresser* v. *Brooks*, 3d Bar., 429. "And we feel bound to follow the authority in this court

" unless it is plainly shown by subsequent adjudications " to be erroneous. * * * The order appealed from " (the order being that a perpetual stay of execution " shall be granted to the bankrupt) must be affirmed " with costs to the respondents."

7. In the case of *Sylvan Shurtliff* v. *Thompson*, decided in 1873, 63d Me., 118, Shurtliff went into bankruptcy August 24, 1870, and suit was commenced against him by Thompson in February, 1871, Shurtliff handed the summons in the suit that had been served upon him to Wm. L. Putnam, his counsel, but Putnam did not appear because Howard and Cleaves had entered a general appearance for Sylvan Shurtliff, as well as Alvah Shurtliff, whom he represented.

At the March term, 1871, the plaintiff discontinued as to Alvah Shurtliff, and took judgment against Sylvan Shurtliff. He had no knowledge of this, or that Putnam did not appear for him until August 10, 1872, when he was arrested on the judgment.

He was discharged from bankruptcy July 15, 1871; the judgment was upon a claim provable in bankruptcy. He expected and intended that Mr. Putnam would attend to his case, and suggest his bankruptcy.

The court say, page 120: " At the March term, 1871, " of the Superior court, the petitioner, one of the defend- " ants in the original action, was defaulted without appear- " ance.

" He intended to appear by counsel, which he had pre- " viously retained for that purpose.

" He had a full, legal defense; but his counsel failed to " appear and make it, for the reason that the latter mis-

"takenly supposed that the petitioner's co-defendant's "counsel also appeared for the petitioner."

Ordered that a review be granted.

8. The facts in the case of *Fisher* v. *Keenan*, decided in the Appellate court of Illinois for the First district, October term, 1877, and reported in the Chicago Law Journal, Vol. I., p. 73, are as follows:

In October, 1873, a petition in bankruptcy was filed against the defendant and others, in the United States District court for the Eastern district of Missouri. On January 6, 1874, plaintiffs in error brought their suit for a debt which might have been proved in bankruptcy.

In apt time defendant in error retained attorneys to defend said suit, and advised his attorneys that he had been adjudged a bankrupt, and his attorneys appeared in the suit and filed a plea. In May, 1874, one Clark, an attorney at law, was chosen assignee in bankruptcy of the defendant, and in July following told the defendant that he would assume the defense of said suit and discharge the attorneys he had retained.

There was some mistake or misunderstanding between Clark and the attorney to whom he had spoken about defending the suit, and the attorney paid no attention to it, but on October 7, 1874, the case was tried, and no one appearing for defendant, the judgment was rendered against him .In March, 1875, a discharge in bankruptcy was issued to defendant in error.

Defendant in error supposed that the suit had been properly defended, and knew nothing about the judgment until June, 1877, when an execution was issued upon the

judgment and demand made upon him. He then moved in the court below to quash and recall the execution and for a perpetual stay of execution, and with his motion filed his discharge in bankruptcy and affidavit setting forth the facts. The court below granted his motion, and the grant of such motion is the error assigned here.

Chief Justice HEATON delivered the opinion of the court:

"This was a suit involving the question where a certain "judgment was rendered against a party who had been "discharged under the bankrupt law. There was an ap- "plication made to the Superior court for the purpose of "setting aside an execution issued in that case, and mak- "ing a permanent order staying the proceedings under "the judgment on the ground that it was discharged un- "der the bankrupt law.

"The Superior court heard certain reasons why the "party was not supposed to be guilty of laches at the "proper time for making his application to stay the pro- "ceedings in the Superior court, and the court below "made an order staying the execution.

"The questions presented by the record are, first, "whether there has been any laches by the defendant "that affect his rights, and the next is, whether the "judgment that was rendered after the adjudication in "bankruptcy and before the final discharge upon a debt "existing prior to the adjudication could be proved under "the bankrupt law, and if so whether the judgment was "discharged by the final action of the bankrupt court.

"We think upon that question that the law is that the "debt could have been proved after as well as before the "judgment. We think that the rendition of the judg-

"ment did not prevent the party from proving the debt "the same as he could have proved it in the bankrupt "court before it became merged in a judgment, and that "the judgment was discharged by the discharge of the "bankrupt. The authorities are somewhat conflicting "upon that subject, but we think the better rule would be "to allow the judgment to be proved and hold that the "bankrupt was discharged therefrom, and in addition to "that we think the party was not bound to use any "greater diligence than he did under the circumstances. "We think the laches in not appearing and asking the "court to continue the case until a final discharge in "bankruptcy was had was not such laches under the evi-"dence as ought to deprive him of the right to take ad-"vantage of his discharge. It was a matter of but small "consequence, for had he appeared in the court below he "could only have had his case continued. He could "neither have got his suit abated nor plead in bar, and "the statute only authorizes a suspension of proceedings "in the court below until the final adjudication. He "does show some reasons possibly why he did not "appear, but whether he did or did not, *we think that if* "*the bankrupt law itself discharges the judgment that it* "*would make but little difference whether he was guilty of* "*laches or not in that particular.* The judgment of the "court below is affirmed."

9. *In re* Stansfield (U. S. District court, District of Nevada), 4 Sawyer, 334. Decided in 1877.

Prior to Stansfield's adjudication as a bankrupt, Rice commenced two suits against him, and after the adjudication judgment was obtained by default. Rice filed specifications in opposition to the discharge, and Stansfield

made a motion to dismiss the specifications on the ground that the judgments having been acquired after adjudication and the original indebtedness having merged in them, they were not provable and consequently that Rice had no such interest as entitled him to object to the discharge.

HILLYER, J., says (page 336): "This involves an inquiry as to whether the debts which did exist at the filing of the petition in bankruptcy, upon which the judgments are based, are so merged in the judgments that they can no longer be said to be 'debts due and payable from the bankrupt at the time of the commencement of proceedings in bankruptcy.' (Sec. 5,067.) Are the judgments new debts, or the old debts in a new form?"

"In England, the cases all agree that against such judgments the defendant may have relief by motion for a perpetual stay of execution, which is always granted. *Bouteflower* v. *Coates*, 1 Camp., 25; *Blanford* v. *Foote*, *id.*, 138, and many others." * * * *

"In America, a decided weight of authority holds that, to do justice, the courts will look behind the judgment in cases like the present, and if the debt upon which it is founded would have been barred, the judgment is barred."

"All the authorities agree that the cause of action is merged in the judgment, and can never be the basis of another suit between the same parties. But, while adhering to this doctrine, all our state courts, except those of Maine and Massachusetts, recognize the limitation to it, that the judgment procured pending the question of discharge is discharged when the cause of action would have been. Cases directly in point are: *Ewing* v. *Peck*,

" 17 Ala., 339; *Imlay* v. *Carpenter*, 14 Cal., 173; *Dress-*
" *er* v. *Brooks*, 3 Barb. S. C., 429; *Clark* v. *Rowling*, 26
" Vt., 307."

" Other cases, involving the same principle, hold that
" the courts will look behind the judgment to see whether
" the debt is one which the discharge would release, and
" give relief to the debtor or creditor as justice shall re-
" quire."

" The result of the cases is thus stated by Mr.
" Freeman in his work on Judgments (Sec. 245): 'It
" has been uniformly held, that whenever a cause of
" action, existing at the time of filing the debtor's peti-
" tion, was of such a nature that the discharge would
" have effected it, any judgment recovered thereon prior
" to the decree of discharge will be affected to an equal
" extent, and that within the meaning of those laws
" (bankrupt and insolvent laws), such judgments are
" never to be regarded as new debts, arising subsequently
" to the filing of the petition.'"

" Opposed are cases cited in Maine and Massachusetts
" upholding the technical doctrine of merger, and refusing
" to recognize the limitation or exception to the doctrine
" which has been stated above. (*Bradford* v. *Rice*, 102
" Mass., 472, and cases cited; *Pike* v. *McDonald*, 32
" Me., 418; *Cran* v. *Houdlette*, 36 *id.*, 15.)

" Prior to the present bankrupt act an almost unbroken
" current of authorities sustains the doctrine, that judg-
" ments obtained pending the bankruptcy proceedings, and
" before the bankrupt receives and has an opportunity to
" plead his discharge, are affected by the discharge just
" as the debts upon which they were founded would have
" been. The only doubt, now, arises in dealing with sec-

"tion 5,106 of the bankrupt act, which provides that "pending suits against him shall be stayed, upon the ap- "plication of the bankrupt.

"*Does the fact, that the bankrupt may have a stay of* "*pending suits until the question of his discharge is de-* "*cided, amount to an opportunity of pleading his discharge,* "*so that a neglect to apply for a stay of proceedings is a* "*neglect to avail himself of a defense to the suit?* The "affirmative of this proposition is maintained forcibly in "the above cited cases of *Bradford* v. *Rice* and *In re* "*Gallison. I am not, however, satisfied that the privilege* "*given the bankrupt in section 5,106 should have the effect* "*of overturning the general rule, that a judgment obtained* "*as those of Rice were, is released, if the debt would have* "*been.*

"*Although the bankrupt* (Sec. 339) *might have had a stay* "*of proceedings by applying to the proper court therefor,* "*yet his failure to do so does not invest the judgment rendered* "*with any other qualities than it would have had if the suit* "*had proceeded by leave of the bankruptcy court;* that is, "to fix the amount upon which the judgment creditor "should receive dividends. The right to a stay is a quali- "fied one. If the amount of the debt is in dispute leave "may be given to proceed to judgment.

"If the amount is not in dispute, there is no need of "proceeding with the suit to fix it; but if, nevertheless, "the suit is permitted by the court, the assignee and the "bankrupt go on to judgment without objections, the "only effect of it is to fix the amount of the probable "debt.

"*That appears to be the view taken by the Supreme court* "*in Norton, assignee,* v. *Switzer,* 3 Otto, 355.

"The suit was assumpsit, brought by Switzer at first "against John and Mary Hein. Pending the suit, upon "suggestion of Switzer that the defendants had taken the "the benefit of the bankrupt law, and that Norton was "their assignee, the District court of Louisiana ordered "Norton to be made defendant, in his capacity of assignee, "in the place and stead of the Heins.

"Process was personally served on Norton, but he "failed to appear, and judgment was rendered against "him. This judgment was affirmed by the Supreme "court of the state, and taken by Norton to the Supreme "court of the United States.

"Upon these facts it was held that the state court had "jurisdiction to pronounce the judgment, but that the "only effect of it was to establish the amount due "Switzer as a basis for dividends. Speaking of the pro- "visions of the bankrupt act in this connection, and "especially of section 5,106, the court uses this language:

"'Actions pending in favor of a creditor * * * at "the time the debtor is adjudged a bankrupt under the "present bankrupt act, if no objection is made by the as- "signee or the bankrupt court, may, due notice being "first given to the assignee, be prosecuted to final judg- "ment to ascertain the amount due to the creditors; but the "judgment will be effectual and operative only to estab- "lish the validity and amount of the claim. Notice in due "form having been given to the assignee, the judgment "may be filed with him as an ascertainment of the amount "due to the creditor, and as a basis of dividends, but it is "effectual and operative *only* for that purpose.'

"So far as appears in the case the bankrupt did not "apply for any stay of proceedings, nor did the creditor

"get leave of the bankruptcy court to proceed for the "purpose stated in section 5,106. And I understand the "court to hold that a judgment in favor of a creditor, pend- "ing the bankruptcy proceedings in a suit begun before, "has only the limited operation stated, although the bank- "rupt may have failed to apply for a stay, and no express "leave of the bankruptcy court was given to proceed in the "suit to judgment. In other words, the fact that the judg- "ment is rendered under such circumstances, of itself, "makes such a judgment special in its character under "section 5,106."

"*The failure of the assignee or the bankruptcy court to "object amounts to leave to go on with the suit to judg- "ment. Qui tacet consentire videtur.*

"Following what I conceive to be the law as declared "in *Norton* v. *Switzer*, I must hold the only effect and "operation of the judgment rendered in the action of *as- "sumpsit* in favor of Rice to be to establish the amount "of his claim, as a basis for dividends. As a consequence "the judgment is a provable debt, will be released by a "discharge duly granted to Stansfield, and Rice is a "creditor having such interest in the question of discharge "as entitles him to be heard thereon."

10. In the case of *Dawson* v. *Hartsfield*, 79 N. C., p. 334, decided in 1878, upon March 5, 1868, the plaintiff commenced his action against the defendant for a debt on a note, and March, 1869, obtained judgment. Defendant filed a petition in bankruptcy on April 17, 1868, and on April 14, 1869, obtained his discharge. Execution issued on the judgment on May 14, 1869, which was returned, no property found. No further action was taken in the cause until May 31, 1878, when notice was given

by the plaintiff to the defendant that he would apply for leave to issue another execution. On the hearing of the motion before the judge, the defendant pleaded the discharge in bankruptcy, which the court held to be a valid defense, and refused to allow execution to issue. The plaintiff appealed.

SMITH, C. J., p. 235: "Two objections are offered to "the defense, which will be successively considered:

"*First.* It is argued that debts existing at the com- "mencement of the bankrupt proceeding alone are "provable against the bankrupt's estate, and that the "plaintiff's debt being merged in the judgment subse- "quently rendered, is neither itself provable nor affected "by the discharge. It is true the bankrupt proceed- "ings all have relation to the time of filing the petition, "and as of that date, the bankrupt's estate is apportioned "among his creditors, his future acquisitions and liabilities "are in no manner involved.

"Several cases have been called to our attention to "show that the effect of this merger is to create a new "debt which can not participate in the distribution of the "estate, and is not discharged by the final decree. It is "so declared by the Supreme court of Massachusetts in "*Bradford* v. *Rice*, 102 Mass., 472, and by the District "court of the United States, *In re Gallison*, 5 Bank. "Register, 253, and in other cases.

"In the last mentioned case, after referring to numer- "ous and conflicting decisions, the District Judge, LORING, "says: 'I am of the opinion that a judgment obtained "'after the adjudication in bankruptcy, creates a new "'debt which cannot be proved in bankruptcy, because "'the judgment is a merger, and creates a new debt.'

"In Mizell v. Moore, 7 Ire., 253, (decided in 1849, under the act of 1841.) This court held that where the "defendant pleaded a set-off of certain bonds which he "afterwards reduced to judgment, the plea was defeated "because the set-off did not exist in the form in which it "was pleaded, nor could the judgment be made available "in its stead, for the reason that it did not meet the "specifications of the plea, and moreover, did not exist "when the plea was put in.

"These decisions all proceed upon the niceties of legal "pleading and rest entirely upon technical rules. They "fail to recognize the spirit and purpose of the act of "Congress, and the reasoning by which they are applied "to cases in bankruptcy is not at all satisfactory to our "minds. This will appear from an examination of the "provisions of the act itself.

"No creditor proving his debt or claim shall be allowed "to maintain any suit at law or in equity, etc. (Rev. "Stats. U. S., Sec. 5,105.)

"To entitle a claimant against the estate of a bankrupt "to have his demand allowed, it must be verified by a "deposition in writing under oath and signed by the de-"ponent setting forth the demand, the consideration "thereof, and whether any and what securities are held "therefor, and whether any and what payments have "been made thereon. (Rev. Stats., Sec. 5,077.)

"The form of proof is in strict accord with the law, "and no claim will be allowed without the necessary "oath. It is required not less to support the debt where "evidenced by the bond of the bankrupt and where re-"duced to a judgment even, than where it rests on parol "proof of the contract on which it is founded. It is the

" debt itself, not the form it may wear, which shares in " the division of the estate, and which is affected by the " discharge. The debt when once created remains one " and the same through all the changes it may undergo in " the evidence to support it. It is the relation of debtor " and creditor on which the bankrupt act operates. Tak- " ing the estate of one and appropriating it to the demands " of the other and putting an end to the relation itself. It " is not a different debt because previous to the judgment " the evidence of it consisted in the debtors bond, but the " judgment simply and conclusively establishes its legal " obligation. The bankrupt law in its practical operation " is an equitable system, and as a court of equity regards " the indebtedness as the essential element to be consid- " ered, and not the form in which it may appear. The " technical rules of pleading, and the evidence applicable " thereto would in a great measure defeat the beneficent " purpose of the law, if allowed to control its opera- " tion, and are obviously not within the scope of its " provision.

" It may be further suggested, as an answer to the ar- " gument that the old debt becomes extinct and a " new debt is created by the judgment, that if this were " so, it would be difficult to see how a voluntary assign- " ment of property could be successfully assailed by a " creditor. As the assignment is valid except as to existing " creditors, or unless made with an actual fraudulent in- " tent, the very act of prosecuting his claim to judgment " in order to subject the property to his debt, would " defeat the purposes by extinguishing the debt itself. " Equally unreasonable is it, to hold a debt to be de- " stroyed by the judgment, and which conclusively ascer- " tains and established its existence and obligation.

"We do not assent to the reasoning contained in the "cases cited, but concur in the numerous adjudications in "which a contrary doctrine is maintained. We will refer "to some of them.

"In Highman v. Devereaux, 65 N. C., 588 (decided in "1871 under the act of 1867), this court decided that the "identity of the debt described and secured in the mort-"gage was not destroyed by the taking of a new bond, "unless such was the intent of the parties, and that it "still retained its mortgage security.

"In Dresser v. Brooks, 3 Bar., N. Y., 429 (decided in "1848 under the act of 1841), a similar provision in the "bankrupt act of 1841 came under review, and the "subject was elaborately discussed. After a full and "careful examination of the English and American "authorities, the court arrived at a conclusion which "it announced in these words: 'We are of the opin-"ion, independently of the authorities to which we have "adverted, that a sound construction of the provision "in the bankrupt act declaring the effect of a discharge "when duly granted, *requires us to hold the certificate to "be a bar to a debt existing when the petition was filed, "notwithstanding such debt had passed into judgment.* It "was provable under the act, and the plaintiff was entitled "to receive upon it his dividend of the bankrupt's estate. "It was therefore precisely such a debt as the policy of "the act intended should be discharged. And it is added; "the consequence of adopting the strict and narrow con-"struction of holding the judgment exempt from the op-"eration of a discharge, because the debt exists in a dif-"ferent form and under a different name, would in the "case of a bankrupt whose debts were numerous, utterly "defeat the benign object of the act, and leave the unfor-

"tunate bankrupt subject to a great portion of his debts "after every dollar of his estate had been faithfully de- "voted to their payment.

"In the notes on Bump's Law and Practice of Bankruptcy, Sixth Edition, 411, the principle is stated with great force and clearness, and supported by numerous "citations: 'A debt upon which judgment has been ren- "dered since the commencement of proceedings in bank- "ruptcy may be proved. *The debt is not extinguished.* "The instrument, contract, or obligation upon which "the debt arose is extinguished, but not the debt. "The debt remains. If this were not so, the judgment "would destroy itself by extinguishing the very founda- "tion on which it is built. The debt was founded on "contract; it is now founded on judgment; but it is the "same debt. A judgment operates to extinguish a "debt only when it produces the fruit of a judgment. It "is a security of a higher nature; it is still but a security "of a higher nature. It is still but a security for the "original cause of action. The theory that the debt is "so merged as to be extinguished, has no application un- "der the bankrupt act.'

"Concurring in this view, we are content to rest our "decision upon the clear and forcible reasoning by which "they are supported. We do not wish, however, to be "understood as holding that the voluntary execution of "a note in place of a previous liability, would not ex- "clude the claim from the class of provable debts, as well "as exempt it from the operation of the discharge. This "being the substitution of a new security by the act of "both parties, such would undoubtedly be the result. Our "opinion is confined to the case of a debt reduced to judg- "ment, and the facts before us. It will not be denied that

"*the release obtained after judgment, may be pleaded in* "*opposition to the plaintiff's motion*, or indeed any good " and sufficient cause growing out of the matters since its " rendition, shown why execution should not issue. We " do not see why the present defense may not be set up " for the same reason. If the debt has been discharged, " surely a court will not lend its aid to enforce it.

" Difficulties have presented themselves in the attempt " to get the benefit of the discharge, in cases where judg- " ment had before been recovered and execution could " be taken out in consequence of there being no oppor- " tunity to plead it.

" In New York, the court suggests that a remedy may " be had by application to the court wherein the judgment " was rendered for an order to stay execution perpetually, " or to stay it until the plaintiff bring a new action on his " judgment, and give the defendant an opportunity to " plead. But it is unnecessary to consider this, because " here the plaintiff is compelled to come into court and " ask leave to issue his execution, and the defendant thus " has opportunity afforded him to show cause in oppo- " sition. * * * As the discharge does not operate " upon the debt ascertained by the judgment, it is, in our " opinion competent for the defendant to avail himself of " it in this way. * * * * * * We are, there- " fore, of opinion that the discharge may be pleaded and " bars the plaintiff's right to have execution."

11. In *Anderson* v. *Anderson*, 65 Georgia, 580, decided February, 1880, the facts were as follows: March 23, 1875, adjudication of bankruptcy, a suit against the bankrupt being then pending in the Chancery court in the State of Tennessee. Proper notice was given to all the

creditors. April 12, 1875, decree against the bankrupt. December 11, 1875, discharge in bankruptcy. No stay of proceedings was asked for; no plea was filed, the case being allowed to go by default: and neither judgment nor debt were proved in bankruptcy. Suit was afterward brought in the State of Georgia, upon the Tennessee decree, and the bankrupt sought to plead his discharge, thus obtained, after the plaintiff, in the State of Tennessee, *had unlawfully prosecuted his suit to final judgment*. The court say, page 519: "If it is a provable debt "against the bankrupt's estate can the lien of a judgment "be preserved from sale and the debt still become ex- "tinct? What effect has the failure of the bankrupt to "suggest bankruptcy, when suit on a provable debt is "pending, or the judgment obtained after his adjudica- "tion * * *?"

"Every debt of whatsoever kind made by the bank- "rupt before the date of his adjudication, except those "created by fraud in some fiduciary character, or having "a legal lien allowed by the law of the *situs* is provable "in the bankrupt court, and when a discharge is granted "the bankrupt is relieved from all such provable debts, "and by the amendatory bankrupt act of 1873, his dis- "charge extends to all liens, judgments, etc., as well as "other liabilities, but it is not necessary here to consider "that amendatory legislation to the system of bank- "ruptcy." * * *

"If, therefore, this be one of the class not by fraud, or "in a fiduciary nature, and having no lien, then it must be "that the discharge of the bankrupt is a good plea to its "enforcement." * * *

"This debt (page 521), whether an old or new one, "whether the dontract, being merged in the judgment,

"and constituting a new debt of record, or remaining as "an old debt with a new form and security, cannot "change its legal status as a debt stripped of its lien as a "judgment, whether the judgment in Tennessee was a "new debt or a new security for the old one, either or "both, would be but a debt here without a lien, and the "the plea would be good, *unless the failure of the bank-"rupt, after his adjudication to plead, or apply for a stay "of proceedings, would bar him of the right.* The pro-"ceedings in bankruptcy were pending when the judg-"ment was obtained, *when the bankrupt was civiliter "mortuus, and when the bankrupt law forbade all pro-"ceedings in the state court?*"

"In those cases where it was held that the bankrupt "was concluded by a judgment, obtained after adjudica-"tion, the courts put their ruling upon the ground that it "was a new debt, and being a debt after adjudication, "was binding upon the defendant in any form, whether "by contract or judgment; by a reference to the brief at "the end of this opinion, it will be seen that the better "rule is, that the judgment is not a new debt, but the "old debt is only merged in the judgment, and thereby "obtains another security, the one provided by law." * *

"So we think (p. 522) the true rule is that the judg-"ment on a contract is not a new debt, in the sense of "contract, debts, but is the old debt maintained, with a "new security—the old debt is merged, so to speak, in "the judgment. As to all defenses then existing, it is "conclusive; but as to a bankrupts discharge, in no sense "is it a new debt."

12. *Arnold* v. *Oliver*, 64 Howard's Pr. Rep., 452, decided January, 1883.

The court say:

DANIELS, J.: "The judgment which was directed to "be canceled and discharged by the final order was re- "covered by the plaintiff against the defendant on the "10th of March, 1876. The indebtedness was contracted "before the 26th of February, 1876, on which day the "defendant filed his petition for his adjudication in bank- "ruptcy. Under the proceedings commenced he was ad- "judged a bankrupt, and, on the 31st day of July, 1876, "discharged from all debts existing against him on the "twenty-sixth day of February of that year. As the "judgment, according to the decision which was made "in *Monroe* v. *Upton*, (50 N. Y., 593), was not such a "merger of the indebtedness as to create a new debt, the "debt as well as the judgment were necessarily dis- "charged by the result of these proceedings under the "bankrupt law. And that, under the authority of sec- "tion 1268 of the Code of Civil Procedure, entitled the "defendant to an order discharging him from the pay- "ment of the judgment and for the cancellation and dis- "charge of the docket thereof. This provision is imper- "ative in its nature, and absolutely entitled the defendant "to such relief." * * * *

13. *Windley* v. *Tankard*, 88 North Carolina, 223, decided February, 1883.

It was argued that inasmuch as the judgments were rendered before the adjudication, that they constituted liens upon the land, and were not displaced by the discharge in bankruptcy. The court say, p. 225, this "propo- "sition is in direct conflict with the decision in *Blum* v.

"*Ellis*, 73 N. C., 293, in which it is held, that all the "property of the bankrupt, whether subject to judgment "liens or not, passes to the assignee, and is *in custodia* "*legis*, and that the creditor must enforce his lien in the "bankrupt court, or it will be lost, and his debt discharged. "The principle thus declared was reconsidered and "affirmed in *Withers* v. *Stinson*, 79 N. C., 341, and again "in *Dixon* v. *Dixon*, 81 N. C., 323."

14. In *Bump's Bankruptcy*, 10th edition, page 82, the law of act 1867, is declared to be that "when a debt, ex- "isting before the commencement of the proceedings, has "been merged in a judgment rendered since such time, it "may be proved, but it is not settled whether the debt or "the judgment must be proved. The costs that have "been incurred since the filing of the petition cannot be "included in the proof." Also in *Bump's Bankruptcy*, 10th edition, page 756: "The discharge releases the "bankrupt from a judgment for a provable debt entered "after the commencement of the proceedings in bank- "ruptcy and *before* the granting of a discharge."

15. In *Freeman on Judgments*, 2d Ed, Sec. 245, under the head of Doctrine of Merger Modified in Proceedings in Bankruptcy, it is stated: "In no class of cases has the "technical operation of the doctrine of merger been so "frequently limited as in those where the effect of a dis- "charge of a debtor under laws for the relief of insolvents, "had to be determined. It has been uniformly held that "whenever a cause of action existing at the time of the "filing of the debtor's petition was of such a nature that "the discharge would have affected it, any judgment "recovered thereon *prior to the discharge*, will be "affected to an equal extent, and that within the meaning

"of those laws such judgments are not to be regarded "as new debts arising subsequently to the filing of the "petition. *Betts* v. *Bigley*, 12th Pick., 572; *Raymond* v. "*Merchant*, 3d Cow., 147; *Fox* v. *Woodbury*, 9th Barb., "498, 2d Md., 457."

Cases Since This Decision.

This case was decided by the Supreme court of Illinois, 105 Illinois, page 627, on the 28th day of March, 1883.

In the case of *Bowen et al.* v. *Eichel*, 91 Indiana, page 22, decided in May, 1883, the Supreme court of Indiana followed the decision of this case by the Illinois Supreme Court, quoting it as an authority; and this is the only adverse decision in the United States since the decision of the Illinois Supreme court. But the Indiana court got its eyes open in about six months, when *Bowen* v. *Eichel* was reversed by the case of

1. *Root* v. *Espy*, 93 Indiana, page 511, decided November, 1883. In its decision the court uses the following language, p. 516:

"This bring us to the consideration of the controlling "question in this case, namely, what is the effect of a dis-"charge in bankruptcy, upon a pre-existing judgment "against the bankrupt? Does it leave the judgment stand-"ing, with the liens and priorities of a valid judgment, to "be enforced or not, as the interests or wishes of the bank-"rupt may require, by the process of the court? Or does "it extinguish such judgment, as a legal and valid obliga-"tion, and destroy all its qualities and incidents?"

"In section 5119, R. S. U. S., it is provided as follows:

"'A discharge in bankruptcy duly granted shall release "the bankrupt from all debts, claims, liabilities and de- "mands which were or might have been proved against "his estate in bankruptcy.'"

"It is not claimed that Jerome B. Root, by his dis- "charge in bankruptcy, was not released from the judg- "ment under which the appellant claims; he was relieved "or discharged by law from the judgment. It ceased to "be a legal obligation on or against him. After his "discharge in bankruptcy he was no longer bound by "the judgment, and could not be compelled, by any pro- "cess known to the law, to pay or satisfy the judgment "debt. By force of the bankrupt law, and the proceed- "ings had under and pursuant to its provisions, the judg- "ment lost its vitality and existence as a judgment. It "had become a thing of the past, a mere dead letter, and "was not even evidence of a subsisting debt. It will not "do to say, as it seems to us, that any of the qualities, "liens or priorities, incident to a valid and existing judg- "ment of a court of superior jurisdiction, adhered to the "mere skeleton of a dead judgment, under which the "appellant claims an equitable interest, superior to the "appellee's interest, in the real estate in controversy.

"We are of opinion that a discharge in bankruptcy "operates as a natural extinguishment of all pre-existing "debts, claims, liabilities and demands against the bank- "rupt which were or might have been proved against his "estate in bankruptcy, *whether they have been reduced to "judgments or otherwise.*"

2. *Easley* v. *Bledsoe*, 59 Texas, 488, decided August, 1883. In this case, the facts were that a judgment had been rendered on the 11th of November, 1875, against a person

who who was in bankruptcy, upon a debt provable at the time of his adjudication, *the judgment being rendered before his discharge.* It was allowed to lay for some time, but finally an execution was issued and the bankrupt having previously secured his discharge, filed a petition asking that the execution be quashed, the collection of the judgment enjoined, and for leave to set up in discharge of the judgment a certificate of the discharge in bankruptcy.

The court uses the following language, page 489:

"We will consider only one of the grounds upon which "the injunction was sued out and perpetuated: the fact "that appellee had been discharged in bankruptcy after "the date of the rendition of the judgment which was en- "joined. It is true that the bankruptcy proceedings were "commenced before this judgment was obtained, and *that* "*no steps had been taken to stay proceedings* in the cause "wherein it was rendered. The debt sued on was prov- "able in bankruptcy, *and the creditor was forbidden to* "*prosecute it to final judgment* until the question of the "debtor's discharge should be determined. (R. S. U. S., "Sec. 5,106.) If the suit could proceed to judgment *it* "*was only for the purpose of ascertsining the amount due,* "which amount might be proved in bankruptcy. (*Id.*)

"If the debtor was discharged *before judgment, it was* "*his duty to plead such discharge in bar of the action,* "and failing to do so, it could not avail him in any other "proceeding as a protection against the demand. *Miller* "v. *Clements*, 54 Tex., 351; *Coffee* v. *Ball*, 49 Tex., 16. "But having been discharged after judgment, his appro- "priate remedy was the one he pursued, viz., by injunction "to stay further proceedings upon the judgment. In such "case it is not improper for the court to inquire into the

"nature of the demand upon which the judgment was "obtained, in order to ascertain whether or not it was "provable in bankruptcy and released by the discharge. "*Flanagan* v. *Pearson*, 42 Tex., 1, *Wade* v. *Clark*, 35 "Am. R., 262; *Anderson* v. *Anderson*, 38 A. R., 797.

"There is some conflict of authority as to whether, in "such cases the original debt or the judgment should be "proved in bankruptcy. (See Bump, Bankruptcy, 508, "for the decisions pro and con.) Some courts, too, have "held that neither the debt nor the judgment were prov- "able in bankruptcy, and hence were not discharged by it. "*Bradford* v. *Rice*, 102 Mass., 472, and other cases cited "in Bump's Bankruptcy, 508. But the great weight of "authority is to the contrary, and such is the effect of the "ruling of our own court in *Flanagan* v. *Pearson*, 42 "Tex., 1.

"*The debt or judgment being provable, it matters not "whether it was actually proved or not, as it was scheduled "by the bankrupt amongst the claims for which he was "liable.* The law provides that the discharge shall release "all debts which were or might have been proved against "the estate in bankruptcy. (R. S. U. S., Sec. 5,119.)"

3. *Braman* v. *Snider*, Circuit court for the district of Minnesota, October 22, 1884, 21 Federal Reporter, page 871.

The facts in the case are as follows: this was an action brought in the Circuit court for the district of Minnesota, upon a judgment obtained in the Supreme court in the State of New York.

The suit in New York was commenced August 8, 1873. Default was made and judgment entered March

29, 1876. This judgment was set aside April 6, 1876. The case went by default again, and a new judgment was entered October 10, 1876. In 1875 the defendant Snider became a resident of Minnesota. July, 1876, he filed his petition in bankruptcy and was adjudged a bankrupt. At this time the New York case was pending against him. On November 25, 1876, *a little more than a month after the judgment in New York*, he was discharged in bankruptcy. The question presented to the court was whether, under the facts above set forth, he would be allowed to plead his discharge. The court uses the following language, page 872:

"If it is conceded that the debtor's attorney in New "York had authority to obtain an order setting aside the "judgment entered March 29, 1876, I am still of the "opinion that the debt or claim in the pending suit in "the New York Supreme court was provable under sec- "tion 5,067, Revised Statutes, against the bankrupt's "estate after the adjudication, July 16, 1876; and "although a judgment was entered before the certificate "of discharge was granted, the debt on which the judg- "ment was entered being a provable claim existing at "the time of adjudication, is barred by the discharge. "The terms of the certificate of discharge, enacted by "section 5,115, Revised Statutes, declares that the bank- "rupt 'is discharged from all debts and claims made "provable' by the bankrupt law, and 'which existed on "the day on which the petition for adjudication was "filed.' The doctrine of merger and extinguishment of "the debt, and that the judgment constitutes a new debt "from the time of the recovery, is not applicable under "the bankrupt act."

4. *Balliett* v. *Dearborn*, District court Northern district of New York, decided May 21, 1886, Vol. 27, Federal Reporter, 507. As this case is short we give it in full:

In this case a judgment was rendered against a bankrupt after the adjudication and before discharge. A motion was made that the judgment be canceled and a perpetual stay of execution be granted. The motion was granted.

5. *Wells* v. *Edmison*, 22 North Western Reporter (New Series) 497, decided Feb. 16, 1885.

In this case, suit was commenced in the State of Iowa on a simple contract debt. Pending the suit, the debtor was declared an involuntary bankrupt. He made no defense and asked for no stay of proceedings, and judgment was taken by default. Subsequently he received his discharge in bankruptcy. A long time thereafter, suit was brought in the Dakota courts on the Iowa judgment. The defendant was allowed to plead his discharge—judgment was entered in his favor. The case came before the Supreme court of Dakota on appeal and the judgment of the lower court was reversed, on two points:

1. The court held that the Iowa judgment was a complete and absolute merger of the original debt and consequently not provable at the time of the adjudication.

2. That section 5,106 of the bankrupt act provided for a stay of proceedings, and that if the bankrupt did not avail himself of its benefit, and allowed judgment to be obtained against him, he could not thereafter plead his discharge to an action of debt on that judgment.

The Dakota Supreme court has five judges—three of them dissented on the first proposition—Smith J. filing the

following opinion (page 500): "I concur in the conclusions, "but not upon the ground that the judgment is a merger "of the debt. That I regard as a mere fiction. The "judgment no more merges or extinguishes the debt than "does a promissory note merge the debt when given on "settlement of an account, or on settlement of an unliqui- "dated or disputed claim of any kind. But I concur solely "on the ground that the defendant has had his day in "court, and failing there to interpose the bar to the action, "and permitting judgment to go against him, he cannot "now, when sued upon the judgment, interpose a defense "which he might have interposed to the original action."

The court, therefore, stood three to two against the doctrine that the debt was merged, and three to two against allowing the bankrupt to plead his discharge, after having failed to obtain a stay of proceedings. The latter point, was the one upon which the court based its decision. Upon this point the court follows the cases of *in re* Williams, 2 N. B. R., 80, by Judge Shipman; *in re* Gallison, 5 N. B. R., 353, by Judge Lowell; *Bradford* v. *Rice*, 102 Mass., 472; *Boynton* v. *Ball*, 105 Ill., 627; and *Bowen* v. *Eichel*, 91 Ind., 22.

We think the opinion of CHURCH, J., dissenting, which is concurred in by FRANCIS, J., is much better considered, and we quote from it.

"The single question presented (p. 500) by this appeal is "this: Is a discharge in bankruptcy, under the act of 1867, "properly pleaded and proved, a bar to an action brought "in a district court of this territory, upon a judgment re- "covered in a circuit of Iowa, after the filing of the peti- "tion in bankruptcy, and prior to the granting of the dis- "charge, in an action commenced by personal service of

"process before the filing of the petition, upon an indebted-
"ness on simple contract then existing? That the question
"thus presented is one of considerable difficulty is mani-
"fest in the diversity of opinion concerning it which has
"prevailed among the many distinguished jurists by whom
"it has, in various forms, been considered. I am not aware
"that it has ever been directly passed upon by the Su-
"preme court of the United States: and this court is
"therefore, at liberty to adopt such a solution of the ques-
"tion as shall seem to it most in consonance with the spirit
"and purpose of the acts of Congress whose shield is thus
"invoked. And I think it must be conceded in the outset
"that that spirit and that purpose were highly remedial and
"beneficent. While, on the one hand, accepting from the
"debtor the surrender of all his estate, and devoting it to
"the payment, so far as it would extend, of the first claims
"and demands of all his creditors who might choose to
"claim their *pro rata* share, the law designed to relieve
"the honest debtor from a burden which he was unable to
"carry, gave him a new start in life, and thus tended, at
"least, to make of him a more useful citizen, better able to
"add to the productive wealth of the country, and to bear
"his due share of the public burdens. Thus considered,
"the operation of the law was beneficial to three classes,—
"to the debtor, to his creditors and to the public at large.

"One of the elements essential to this beneficent opera-
"tion was the protection guaranteed by the discharge
"against all enumerated debts and claims existing at the
"time of filing the petition, and provable against the estate
"of the bankrupt, *and it certainly was never intended or*
"*contemplated that any creditor of the class designated*
"*should, by any mere failure or refusal to avail himself of*
"*the provisions of the act, or to share in the distribution*

"*of the estate, or by any act or device of his own, obtain*
"*any undue advantage over the debtor, his fellow-creditors,*
"*or the public, or defeat the wise and salutary purposes of*
"*the law. Yet, if the discharge here pleaded and proved*
"*is not a bar to the present action, this is precisely what*
"*will be accomplished by this creditor.* If he is to succeed in
"his attempt, it must be because we are compelled by some
"inflexible rule of law to say that because he elected to re-
"fuse to share in the bankrupt's estate, and, in spite of the
"prohibition of the act (section 5,106,) to prosecute his
"claim to judgment, against that judgment the shield of
"the bankrupt law is no defense. That such is the law is
"now declared by this court, and this declaration is un-
"doubtedly supported by an array of authorities which
"must command the highest respect.

"The reasons assigned for the conclusion may be sum-
"marized as follows: The debts from which the bankrupt
"is released by his discharge, are those which are, or might
"have been, proved against this estate. The debts made
"provable are those belonging to certain designated
"classes, which existed on the day on which the petition
"was filed. By operation of law, the original debt became
"wholly merged and extinguished in the judgment, which
"thereby became *the debt*,—a new debt; and this judgment
"not having been in existence on the day when the petition
"was filed, was, manifestly, not provable against the bank-
"rupt's estate, and therefore not affected by the discharge.
"It is further urged that this judgment imports absolute
"verity, and is conclusive of the defendant's indebtedness
"at the time, in the amount thereof, and that he had then
"no defense to the action.

"Among the authorities cited in support of these pro-
"positions are *Bowen* v. *Eichel*, 91 Ind., 22; *Boynton* v.

"*Ball*, 105 Ill., 627; *Bradford* v. *Rice*, 102 Mass., 472; the "opinion in the latter case being delivered by Chief Justice "Gray, now a member of the United States Supreme court. "Evidently the controlling principle in these cases is that "the debt was wholly merged and extinguished in the "judgment, which thus became a new debt, and therefore "was not provable against the estate. This particular "branch of the question came before the United States Dis- "trict courts for adjudication in the early history of the "bankrupt law, and met with various determinations. "Judge Shipman holding that such judgments were not "provable (*Re Williams*, 2 N. B. R., 80), while judges "Blatchford, Withey, Longyear and Hillyer maintained "the contrary views. *Re Brown*, 3 N. B. R., 145; *Re* "*Vickery*, *Id.*, 171; *Re Crawford*, *Id*; *Re Stevens*, 4 N. B. "R., 122; *Re Stansfield*, 4 Sawy., 334; and the court of "common pleas of New York, (Brady J.), in the case of "*World Co.* v. *Brooks*, 3 N. B. R., 146, where, in a sim- "ilar case, proceedings supplementary to the execution "were taken against the bankrupt judgment debtor, "vacated such proceedings on the applications of the de- "fendant.

"Upon the main question the courts of New York have "almost or quite uniformly held that such judgments were "released by the discharge. I cite but a few of the cases "from that state, *Dresser* v. *Brooks*, 3 Barb., 429; *Arnold* "v. *Oliver*, 64 How. Pr., 452; *Fox* v. *Woodruff*, 9 Barb., "498; *Johnson* v. *Fitzhugh*, 31 Barb. Ch., 372; *Clark* v. "*Rowling*, 3 N. Y., 216; *Monroe* v. *Upton*, 50 N. Y., 593. "Of these I shall only quote a few words from the opinion "of Gridley, J., in *Dresser* v. *Brooks*, *supra*, who says: "'A sound construction of the provision in the bankrupt "act declaring the effect of a discharge, when duly

"granted, requires us to hold the certificate to be a bar "to a *debt* extinguishing when the petition was filed, not- "withstanding such debt has passed into a judgment. It "was provable under the act, and the plaintiff was en- "titled to receive upon it his dividend of the bankrupt's "estate. It was therefore precisely such a debt as the "policy and spirit of the act intended should be dis- "charged.' To hold that, because the debt had passed "into the new form of a judgment, it was therefore exempt "from the operation of the discharge, he says, 'might in "some cases, utterly defeat the benign objects of the act, "and leave the unfortunate debtor subject to a great por- "tion of his debts after every dollar of his estate had "been faithfully devoted to their payment.'

"The courts of England, under their bankrupt acts, have "almost uniformly held that the discharge operated upon "judgments recovered pending the proceedings in bank- "ruptcy, and Judge Gridley clearly shows that these de- "cisions have their foundation in the doctrine that the "original debt is not extinguished in the judgment, but "that the judgment is a higher security therefor. * * *

"I have not overlooked the case of *Revere Copper Co.* "v. *Dimock*, 90 N. Y., 33, supposed by counsel for appel- "lants to sustain the opposite views, but I find nothing in "that case inconsistent with the earlier cases cited. On the "contrary, the court expressly places its decision upon the "ground that the judgment was recovered *five days after* "*the discharge was granted*, and therefore held that in an "action upon that judgment it was not open to this collat- "eral attack. It is difficult to see how they could have "held otherwise. Nor have I omitted to notice that the "earlier New York decisions were upon the bankrupt act "of 1841, which contained no such specific provision as the

"act of 1867, authorizing the court, upon proper applica-
"tion, to stay proceedings in the pending action to await
"the result of the proceedings in bankruptcy. The answer
"to this is two-fold: *First*. It would seem, that notwith-
"standing such omission in the act of 1841, the same pro-
"tection was in fact afforded by the courts to the debtor
"under that act. 4 Wait, Pr., 579; 2 Barb. Ch. Pr., 169,
"179, 589, note 11, 626; *Re Bellows*, 3 Story, 428; *Dres-*
"*ser* v. *Brooks*, 3 Barb., 433 (opinion of Allen, J.). *Second*.
"The mere existence or non-existence of such a provision,
"either by express enactment or by acknowledged prac-
"tice, could not affect the legal character or effect of a
"judgment.

"If the New York courts were right in their decisions,
"it must be because these judgments did not possess the
"character now sought to be attributed to them. Right
"here, then, I think, we must seek the solution of the ques-
"tion before us, for this is the point around which the in
"quiry revolves. Is a debt upon which a judgment is re-
"covered not only merged, but also extinguished, in
"that judgment? That it is merged, in a certain sense, I
"freely concede. That it is extinguished, I must venture to
"deny, notwithstanding the eminence of those who have
"held the contrary view. One of these for whose opinions
"I entertain the greatest respect (Beasley, C. J., of the Su-
"preme court of the State of New Jersey), puts the oppos-
"ing view as strongly as possible when he says: "'The
"effect of a judgment at common law is practically to
"destroy, so long as it exists, the ground in which it rests,
"(*Barnes* v. *Gibbs*, 31 N. J. Law, 317,) an assertion which
"immediately suggests the inquiry, if the ground on
"which it rests is destroyed, on what shall it thereafter
"rest? Certainly, as already intimated, the English

"courts have taken an entirely different view of this "matter.' * * *

"Mr. Bump, in his work on Bankruptcy, (6th Ed.) "411, says: "'The debt remains. If this were not so, the "judgment would destroy itself by extinguishing the "very foundation upon which it is built. The debt was "founded upon contract; it is now founded upon judg- "ment, but it is none the less the same debt. A judg- "ment operates to extinguish a debt only when it pro- "duces the fruits of a judgment. It operates as a change "of remedy merely. It is a security of a higher nature. "It is still but a security for the original cause of action. "The theory that the debt is so merged in the judgment "as to be extinguished has no applicability under the "bankrupt act.' The doctrine of this author, above "quoted, is, I think, fully sustained by the authorities "already cited.

"Another author states the doctrine thus: "'It has been "uniformly held that whenever a cause of action, existing "at the time of filing the debtor's petition, was of such a "nature that the discharge would have affected it, any "judgment recovered thereon prior to the decree of dis- "charge will be affected to an equal extent, and that "within the meaning of those laws such judgments are "never to be regarded as new debts, arising subsequently "to the filing of the petition.' (Freem. Judgm., Section "245.)

"But again it is urged that, inasmuch as the bankrupt "law provided a method by which the debtor might have "prevented the recovery of the judgment, and he failed to "avail himself of its protection, he cannot now be heard to "allege anything against the judgment. His mouth is "closed. (Rev. St., Sec. 5,106.)

"The Supreme court of Illinois in *Boynton* v. *Ball*, *supra*, "put the case thus: "'We are not aware of any case that "holds that where a defense might have been made to a "pending cause of action, but was not set up solely "through the negligence of a defendant, such defendant "may afterwards interpose the same defense to the judg-"ment which has been rendered against him. It is or-"dinarily enough that a party has had a day in court and "an opportunity to plead his defense." The answer to "this is that the protection afforded by the statute is not in "the form of, and does not constitute a defense to, the ac-"tion at all. On the contrary, it is largely founded on the "hypothesis that the debtor has no defense, since, if the "claim of the creditor is disputed, the statute provides for "allowing the action to 'proceed to judgment for the pur-"pose of ascertaining the amount due, which amount may "be proved in bankruptcy, but execution shall be stayed.' "It will be observed that here is no provision for any "special form of judgment. The action proceeds to "judgment by leave of the court in the ordi-"nary way: the amount ascertained to be due "is provable, and the execution is stayed, to await "the determination of the court as to his discharge. Now, "can it be seriously contended that if a bankrupt, against "whom an action is pending, goes before the court, asks "for a stay of proceedings, insists that he is not indebted in "the amount claimed, and then, as it may be, consents that "the action proceed to judgment for the purpose of ascer-"taining the amount due, the indebtedness will not be "merged and extinguished in the judgment which may be "recovered, but will be provable against the estate and re-"leased by the discharge, while, if the same bankrupt, "acknowledging the indebtedness as claimed, permits judg-

"ment to be recovered against him without the formalities
"indicated, the indebtedness would, by operation of law, be
"wholly merged and extinguished in such judgment, would
"not be provable, and would not be released by the dis-
"charge?

"What is the real design of the provisions of section
"5,106? Is it to impose upon the debtor certain conditions,
"on the observance or non-observance of which shall de-
"pend the question whether the debt sued for shall or shall
"not be released by the discharge which may be granted
"him? Or is it designed to protect the debtor, his estate,
"and all interested in it, from being harassed by needless
"litigation? *Surely there can be but one answer to this*
"*question, and I fail to see how the legal operation of the*
"*discharge can be affected by the omission of the bankrupt*
"*to avail himself of the provisions of this section.*

"I am not unmindful of those cases in the Supreme court
"of the United States referred to in the opinion of the court,
"which hold that until the pendency of the proceedings in
"bankruptcy is in some proper way brought to the notice
"of the court in which a suit against the bankrupt may be
"pending, it is not only the right but the duty of such
"court to proceed to judgment in the cause; but my at-
"tention has not been called to any case in that court which
"determines the effect of a discharge upon a judgment
"which might be rendered against the bankrupt in conse-
"quence of his failure to procure a stay; although I am
"aware that, in one of the cases referred to Justice Gray
"suggests the possibility that a judgment might not be
"discharged; a suggestion which, perhaps, might naturally
"have been expected from one who formerly, in the state
"court over which he presided, furnished some of the most
"important authority for that doctrine.

"Upon a complete review of the authorities cited, and "consideration of the reasons which have led to their de- "cisions, I am satisfied that the sounder and better view, "and the one most in harmony with the whole spirit and "purpose of the bankrupt act, is that which refuses to con- "sider the debt as extinguished in the judgment, but re- "gards it as a subsisting obligation, provable against the "bankrupt's estate, and therefore embraced within the "operation and effect of the discharge, notwithstanding the "judgment." * * * *

This case is not as though the party had approved before the court in Iowa, which rendered the judgment, and thus had directly attacked thae judgment itself, and had sought to set it aside and stay further proceedings on the ground that the obtaining of such judgment was an unlawful act in the plaintiff, pending proceedings in bankruptcy; that since service of process was had upon the defendant, as was the fact in the case at bar, the defendant had died, or became *civiliter mortuis*; that the assignee, who was his legal representative after such death, had never been made a party to the proceedings; but the judgment having been rendered and a transcript taken to Dakota and sued on, the question upon the issue simply was, whether at a given time before that the defendant was indebted to the plaintiff. Having jurisdiction of the question and the person, the court in Iowa had decided that it was so indebted, and rendered the judgment.

The court in Dakota held in effect the judgment in Iowa bound the defendant on that question, and so long as he permitted that judgment to stand so long it must be regarded by other courts and in other states with absolute verity.

But we are in the very court which rendered, raising questions as to whether the judgment shall be permitted to stand in that court, to be held as valid elsewhere, and the question we bring to this court is whether that court decided rightly.

DECISIONS OF THIS COURT.

1. *Norton, assignee*, v. *Switzer*, 93 U. S. R., 355. Decided October, 1876.

Switzer brought suit against Mary Hein and John Hein in the state courts of Louisiana. Pending the suit the defendants were adjudicated bankrupts, and their bankruptcy suggested, and Norton, their assignee, substituted in their stead by order of court. The assignee failed to appear, and judgment was taken against him by default. Neither the bankrupt nor his assignee obtained a stay of proceedings or defended the suit in its later stages.

A great many questions arose in this case, but the error assigned which affects the case at bar is as follows: "That "the decree in bankruptcy divested the subordinate court "of all authority to proceed further in the case." Although the effect of a bankrupt's discharge on a judgment obtained pending bankruptcy does not arise directly, still the court in discussing the question of jurisdiction of the state court, discusses and construes the sections of the bankrupt act involved in the case at bar.

CLIFFORD, J., page 359: * * * "The assignee may "sue for and recover the said estate, debts and effects, "and may prosecute and defend all suits at law or in "equity pending at the time of the adjudication of bank- "ruptcy, in which such bankrupt is a party, in his own

"name, *in the same manner and with the like effect as they* "*might have been prosecuted or defended by such bank-* "*rupt.*"

"*Except* (page 360) *where the amount is in dispute*, no "creditor of the bankrupt is allowed to prosecute his suit, "whether at law or in equity, to final judgment, until the "question of the debtor's discharge shall have been de- "termined; but the provision is, that if the amount due "the creditors is in dispute, the suit may, by leave of the "court in bankruptcy, proceed to judgment for the pur- "pose of ascertaining the amount due; in which event "the amount recovered may be proved in bankruptcy, but "the execution must be stayed to await the determination "of the question of discharge." (14 Stat., 527, Sec. 21.)

"It is suggested (page 362) that creditors having debts "provable under the bankrupt act are forbidden to prose- "cute to judgment suits at law or in equity against the "bankrupt; but it must be borne in mind that the pro- "hibition in that regard only operates until the question "of the debtor's discharge has been determined. Credi- "tors cannot sue the bankrupt, and recover judgment "against him, pending the bankrupt proceedings; but the "regulation in respect to suits pending when the proceed- "ings commenced is special, and should receive careful "consideration."

"Pending suits are usually continued, at least during a "reasonable time, for the reason that the Bankrupt Act "provides that any such suit or proceedings shall, upon "application of the bankrupt, be stayed, if there be no un- "reasonable delay, to await the decision of the bankrupt "court as to the discharge of the debtor. Applications "of the kind are usually granted; but the same section "of the bankrupt act provides that if the amount due the

"creditor is in dispute, the suit, by leave of the court in "bankruptcy, may proceed to judgment for the purpose "of ascertaining the amount due, which amount may be "proved in bankruptcy, the rule being, that the judgment "ascertains the amount, but that execution must be stayed. "(14 Stat., 527; Rev. Stat., Sect. 5,106.)

"Nor does it make any difference (page 363), that the "assignee did not appear at the trial, as the record shows "that he was notified in person that he had been made a "party to the suit. Having been duly served with a "citation in due form, he might have appeared, if he had "seen fit, and objected to the further prosecution of the "suit by plea or motion; but he silently acquiesced in the "order of the court."

"Actions pending in favor of a creditor (p. 364), under "such circumstances, at the time the debtor is adjudged "bankrupt, under the present Bankrupt Act, if no objec- "tion is made by the assignee or bankrupt court, may, due "notice being first given to the assignee, be prosecuted to "final judgment to ascertain the amount due to the "creditor; *but the judgment recovered will be effectual and "operative only to establish the validity and amount of the "claim.*"

"Notice in due form having been given to the assignee, "the judgment may be filed with him, as an ascertain- "ment of the amount due the creditor and as a basis of "dividends; *but it is effectual and operative only for that "purpose, the express requirement of the same section of the "Bankrupt Act, being that the execution shall be stayed.*"

2. This court, in *Dimock* v. *Revere Copper Co.*, in 117 U. S. R., 559, on April 5, 1886, decided that when a judgment is obtained in one state *after* a discharge in bank-

ruptcy and a transcript taken to another state and suit brought on it, the discharge in bankruptcy cannot be pleaded in the second suit to show that the bankrupt did not owe the debt, because that question had once been decided by a court having jurisdiction of the parties and of this very question of indebtedness, and this decision had never been reversed. Although the question decided is not our question, still as it is a decision of this court, we produce it.

The facts are as follows: January 13, 1874, suit against Dimock was commenced in Massachusetts, on notes made in 1872. June 23, 1874, Dimock adjudicated a bankrupt. March 26, 1875, Dimock was discharged in bankruptcy. April 1, 1875, judgment rendered: 1st. No stay of proceedings was obtained after adjudication and before discharge. 2d. Although the discharge was obtained five days before final judgment, it was not pleaded in bar.

Suit was afterward brought on the judgment, in the State of New York, where Dimock sought to plead his discharge in bankruptcy. The court held that it had been decided, by a court having jurisdiction of the party and the question, that he did owe the debt. The decision was reversed by the Supreme court of New York, and again reversed by the court of Appeals. It was then taken to the Supreme court of the United States, which affirmed the decision of the court of Appeals.

This court held that the judgment, so long as it was permitted to stand, was valid, and must be treated as such.

The court say (page 565): "So here if Dimock "had brought his discharge to the attention of the "Superior court (of Massachusetts) at any time before

" judgment, it would have been received as a bar to the " action, *and under proper circumstances, even after judg-* " *ment, it might be made the foundation for setting it* " *aside, and admitting the defense.* *Ray* v. *Wight*, 119 " Mass., 426; *Page* v. *Cole*, 123 Mass, 93; *Golden* v. " *Blaskopf*, 126 Mass., 523. Nothing of the kind was " attempted. The question before the Massachusetts " court for decision at the moment it rendered its judg- " ment, was whether Dimock was then indebted to the " copper company. Of Dimock and this question it had " complete jurisdiction, and it was bound to decide it on " the evidence before it. Its decision was therefore con- " clusive, as much so as any judgment where the juris- " diction is complete. It concluded Mr. Dimock from- " ever denying that he was so indebted on that day, " wherever that judgment was produced as evidence of " the debt. If he had the means at that time to prove " that the debt had been paid, released or otherwise sat- " isfied, and did not show it to the court, he cannot be " permitted to do it in this suit; and the fact that the evi- " dence, that he did not then owe the debt, was the dis- " charge in bankruptcy made five days before does not " differ from a payment and receipt in full, or a release " for a valuable consideration." * * *

" We are of opinion (p. 566) that, having in his hands " a good defense at the time judgment was rendered " against him, viz., the order of discharge, and having " failed to present it to a court which had jurisdiction of " of his case, and of all defenses which he might have " made, including this, the judgment is a valid judgment " and that the defense cannot be set up here in an action " on that judgment."

" *It is clear that until the judgment of the Massachusetts*

"*court is set aside or annulled by some direct proceeding in* "*that court* its effect cannot be defeated as a cause of ac- "tion when sued in another state, by pleading the dis- "charge as a bar, which might have been pleaded in the "original action."

In the case at bar we seek to set aside or annul the judgment by a direct proceeding in the court which rendered it, and in our case too, the judgment was obtained *before* the discharge, and when the obtaining of such judgment was *unlawful*, and not *after* discharge, when the period in which it had been unlawful to prosecute a suit had expired, and when there was no incompatibility between the ordinary laws for the collection of debts and the bankrupt laws.

Summary of Cases.

English Cases.

		A. D
1. Bateflour *v.* Coates	1 Cowp., 25	1774
2. Blandford *v.* Foot	1 Cowp., 138	1774
3. Scott *v.* Ambrose	3 Maule & Sel., 326	1814
4. Willett *v.* Prindle	5 Bos. & Pul., 190	1806
5. Dinsdale *v.* Eames	2 Brod. & Bing., 8	1820
6. Davis *v.* Shapley	1 Barn. & Adolph., 54	1830
7. Barrow *v.* Poile	1 Barn. & Adolph., 629	1830
8. Humphreys *v.* Knight	Bingham's R., Vol. 6, 572	1830
9. Imlay *v.* Carpenter	14th Cal., 173	1859

Cases Under the Act of 1841.

1. Graham *v.* Pierson	6 Hill, 247	1843
2. McDougal *v.* Reid	5 Ala., 810	1843
3. Rogers *v.* West Marine Fire Ins. Co	1 La. Ann., 161	1846
4. Curtis *v.* Slosson	6 Penn. St., 265	1847
5. Mechanics Banking Assn. *v.* Lawrence	1 Sanford, 658	1847
6. Harrington *v.* McNaughton	20 Vt., 293	1848
7. Turney *v.* Gatewood	8 B. Munroe, 613	1848
8. Blake *v.* Bigelow	5 Ga., 437	1848
9. Johnson *v.* Fitzhugh	3 Barb. Ch. Rep., 372	1848
10. Petros *v.* McLaughlin	6 Grattan, 64	1848
11. Cogburn *v.* Spence	15 Ala., 554	1849

A. D.

12. Clark *v.* Rowling..... 3 Com., 216.....1850
13. Fox *v.* Woodruff..... 9 Barb. Rep., 499.1850
14. Dick *v.* Rowell..... 2 Swan(Tenn.),632 1853
15. Downer *v.* Rowell.....26 Vt., 397.....1854
16. McDonald *v.* Ingraham...30 Miss., 389.....1855
17. Imlay *v.* Carpenter.....14 Cal., *173.....1859

CASES UNDER THE ACT OF 1867.

1. Cornell *v.* Dakin.....38 N. Y. R., 253...1868
2. August No. of the Jurist.
3. *In re* Stephen Brown..... 3 Nat. Bank, Reg., 585.....1870
4. *In re* Crawford ..... 3 N. B. Reg., 698.1870
5. *In re* Stephens..... 4 N. B. Reg., 369.1871
6. Monroe *v.* Upton.....50 N. Y., 596.....1872
7. Shurtliff *v.* Thompson....63 Me., 118.....1873
8. Norton, assignee, *v.* Switzer U. S. R.(3 Otto), 355.1876
9. Fisher *v.* Keenan.....Chicago Law Journal.1876
10. *In re* Stanfield..... 4 Sawyer, 334....1877
11. Dawson *v.* Hartsfield.....79 N. C., 334.....1878
12. Dresser *v.* Brooks..... 3 Barb. N. Y., 429.1848
13. Anderson *v.* Anderson....65 Ga., 580.....1880
14. Arnold *v.* Oliver.....64 Howard's Pr. Rep., 452.....1883
15. Windley *v.* Tankard.....88 N. C., 223.....1883
16. Bump on Bankruptcy....10 Ed., p. 82.
17. Freeman on Judgments... 2 Ed., Sec. 245.
18. Root *v.* Espy.....93 Ind., 511.....1883
19. Easley *v.* Bledsoe.....59 Texas, 488.....1883
20. Braman *v.* Snider.....21 Fed. Rep., 871..1884
21. Wells *v.* Edmiston.....23 North Western Reporter.....1885
22. Balliett *v.* Dearborn.....27 Fed. Rep., 507..1886

The Supreme court of the State of Illinois in its opinion says, in substance, that the question presented is one upon which there is a serious conflict of authority. We beg leave most respectfully to differ. The cases, when they are all dug out, present an almost unbroken array of authority from 1774 to 1886, more than one hundred years, and when we consider the number of judges in this country and England during this time, the frequency with which the question has arisen, the difficulty and labor of hunting out old statutes and decisions, the cases opposed to these, may be well termed *sporadic*, and are fewer than would be expected, and fewer than are to be found on any other question equally complicated.

We therefore, respectfully submit these authorities, forty-seven in number, embracing the uniform decision of the English courts, and seventeen of our own states, six cases in the District and Circuit courts of the United States, and one of this very court, as decisive of the question of merger and the illegality of the judgment obtained for any purpose except as the basis of a dividend, pending bankruptcy proceedings. We submit too, that the cases we present are well reasoned, and they have the strength of the law and the argument upon their side.

In the argument made in this case before the Supreme court of Illinois we assumed that the bankrupt statutes of England, that of 1841 and that of 1867, heretofore set out on pages 9 to 13 *ante*, to be alike in legal effect, and cited substantially the same cases we have cited heretofore, but they were not separated and the cases arising under each law given as they are here, and no question of a difference having been made by our adversaries, *we did not think to guard against its being made by the court.* But the opinion being filed we find that—

OUR SUPREME COURT IN THE HASTE OF BUSINESS COMPLETELY MISTOOOK THE PROVISION OF THE ENGLISH STATUTE APPLICABLE, AND UPON WHICH THE DECISIONS ARE BASED, AND BECAUSE A PROVISION SIMILAR TO THE ONE THEY REFER TO AND WHOLLY INAPPLICABLE TO THE SUBJECT UNDER DISCUSSION, IS NOT FOUND IN OUR STATUTES, REJECT THE ENGLISH CASES ALTOGETHER FROM CONSIDERATION.

There ought to have been a motion for a rehearing and the court's attention called to this mistake. It was simply a mistake, and all men are liable to them. "The tightest vessels will leak in dry times."

Our Supreme court in its opinion says, page 25, *ante:* "We do not question the rule in England. It is uniform; but "the decisions in England cannot be relied on as authority "here, for the reason that *they are predicated upon a pro-* "*vision of the statute of that country which does not exist* "*in our bankrupt law. The substance of the statute is* "*that if the creditor did obtain judgment, before final dis-* "*charge, and take the debtor in execution,* HE *should be* "*discharged on motion.*"

We must, therefore, look critically this time into the English cases and statutes, to see what questions were under consideration, and how they were decided, and what the statutes were, and upon what provisions of the statute these decisions were based.

The English statute, of 1732, upon the subject referred to by our court, *ante* page 9, provided that

"Every bankrupt shall be discharged from all debts by "him, her or them, due or owing, at the time that he, she

"or they became bankrupt; and in case any such bankrupt "shall afterward be arrested, prosecuted or impleaded for "any debt, due before such time as he, she or they become "bankrupts, such bankrupt shall be discharged upon com- "mon bail," etc.

Under this statute of 1732 arose the cases of Bateflour v. Coates in 1774; Blanford v. Foot in 1774; Willett v. Prindle in 1806; Scott v. Ambrose in 1814, and Dinsdale v. Eames in 1820. These cases are given *ante* pages 17 to 20.

In *Bateflour* v. *Coates*, the plaintiff sought to hold the defendant liable on his bail bond given before his discharge. The rule *nisi* was made absolute.

Blanford v. *Foot* was an application to discharge a bankrupt in custody upon a judgment, where the debt on which it was obtained was provable. Nothwithstanding this special provision for the discharge of the person of the prisoner in the statute, the court did discharge him upon the ground that *the debt* itself had been discharged by bankruptcy.

In *Scott* v. *Ambrose* the defendant brought a writ of error in Parliament upon a judgment erroneously standing against him, and his writ was non-prossed, and forty pounds awarded against him as costs. The plaintiff issued a *fi. fa.* for these costs and a rule *nisi* was made absolute for the setting aside of the writ for these costs.

Willett v. *Prindle* was a judgment, like the present, obtained before discharge. It was conceded the judgment was discharged but costs were claimed. Lord Mansfield decided in substance that "the tail goes with the hide."

In *Dinsdale* v. *Eames* "The question" (as stated by the plaintiff's counsel), "is whether the defendant, in an "action on a bail bond, becoming bankrupt, between plea "and verdict, and obtaining his certificate after final judg- "ment, is discharged from damages and costs." The court said: "The debt was contracted before the bankruptcy "of the defendant, and therefore might have been proved "under the commission." This case was for the recovery of fifty pounds alleged to have been wrongfully paid the sheriff, and which was paid the day of defendant's arrest, and the day of his discharge. The court made absolute a rule *nisi* for the restoration of the money.

The English cases which arise under the acts of 1806, 1809 and 1825 set out, pages 10, 11 and 12 *ante*, and which are similar in legal effect to the act of 1867, (except that they contain a provision for the discharge of the defendant when arrested, while ours does not), are those of Davis v. Shapley, Barrow v. Poile and Humphreys v. Knight found on pages 20 to 24 *ante*.

In *Davis* v. *Shapley*, plaintiff obtained judgment on suit commenced in November, 1829. Commission in bankruptcy issued in December, 1829, and certificate of discharge was issued April, 1830. On the 20th day of May a levy was made on goods bought since the discharge. A statute in legal effect just like that statute of 1867, was set up by the defendant's attorney, and Bayley, J., and Lord Littledale released the levy on the ground that the defendant had complied with the bankrupt law, that that law discharged him from the debt, and he would not be discharged if the plaintiff had the right continuously to levy on his goods.

In *Barrow* v. *Poile*, levy was made on defendant's

goods on a judgment for a debt provable and obtained before discharge. The goods levied on had been bought since discharge. Lord Tenderden released them under a statute precisely similar to that of 1867, which he quotes on page 23 *ante*.

Humphreys v. *Knight* was for the release of the defendant from custody for a cause *not specified in the statute* as a ground for release. TINDALL, J., took a broader view of the question and discharged the defendant, saying, in substance, that a statute precisely like that of 1867, and which discharged the defendant from the debt, "acts "as a complete discharge from the time it was granted."

The learned judge therefore discharged this defendant when the statute did not especially authorize his discharge, but because he found him imprisoned for a debt which he did not owe.

The English statutes, therefore, provides the defendant shall be discharged by certificate from all debts which were provable. Our statute provides the same thing. The English statute provides for the release of a man arrested, upon final process. We cannot arrest a man under final process, and therefore we have no statute to release him. Our various constitutions which prohibit imprisonment for debt, take under our system, the place of the English statute discharging the defendant from arrest for debt.

The remedies in England upon a judgment ordinarily were two-fold—a levy upon property of the defendant and his arrest in execution. The effect of the statutes was to take away both of these remedies in reference to debts provable and pending the bankruptcy proceedings. By all these statutes the defendant was discharged from the

debt and the arrest in reference to such debts. Is not the legal effect of our statute the same? In England it was not unlawful to proceed, but all the benefits of such procedure were cut off by releasing the levy and the person of the defendant; under our statute it is made unlawful to proceed at all.

Again: such a statute releasing the defendant was unnecessary even in England, because, as has been held by their courts, the defendant was to be discharged from arrest, and the essence of the reason was that the court found him imprisoned by law for a debt from which the law had released him, and therefore he ought to be discharged independent of the special statute.

The reason, therefore, of the five wise men of Illinois who made this decision (two dissenting) is a crooked stick in the wood-pile of this investigation. Boys would laugh profanely and say, "didn't read 'em;" and we may be pardoned for indulging our most dignified smile and suggesting that the examination of these English decisions was slightly superficial.

Our Supreme court also adds, immediately following the quotation just commented upon:

"If our bankrupt law contained the same provision as "that of England, then the decisions might be regarded "as authority."

That is, if our law contained a provision to the effect that a man who cannot under our system be arrested at all, shall be discharged, then light would be thrown upon the question of the right to obtain a judgment pending bankruptcy, and whether that judgment should be paid in full out of new assets.

We most respectfully confess our failure to see how that provision, if it were in our statute, would throw any light on the question we are discussing.

OUR STATUTES ARE ALSO IN LEGAL EFFECT LIKE THE ENGLISH, IN REFERENCE TO THE RIGHT OF THE DEFENDANT TO STAY PROCEEDINGS PENDING BANKRUPTCY, IN REFERENCE TO DEBTS PROVABLE.

The provision of our statute is:

"And such proceedings shall, on the application of the "bankrupt be stayed," etc.

The legal effect of this provision makes it imperative on the court to stay proceedings when requested, but it is optional with the bankrupt whether or not he will ask such stay. It might read: "If the bankrupt shall make "application it shall be imperative upon the court to grant "the stay," and the question is, if he shall, for any reason, fail to make the application, does he lose a right altogether, which is given him, *provided he will comply with other and different conditions of the statute, upon which his right of discharge depends.*

Boynton complied with all the conditions of the bankrupt law, in fact. The court having jurisdiction of his person, and of this question, found (see page 16, *ante*), that he had "conformed to all the requirements of the "law in that behalf," and having found this, it released him from all debts existing on the 15th day of April, A. D. 1878, the date of his adjudication, in which is included this debt. The law provides that this certificate shall be conclusive evidence of such compliance. Now, it is contended by the defendants in error that this certificate is

inoperative, because Boynton failed to ask for a stay of proceedings, notwithstanding such defendant prosecuted this suit to judgment, when this very statute positively prohibits him from doing that very thing.

Our first answer to this position is, that the English statutes in reference to stay of proceedings, contained a provision in legal effect similar to the statute of 1867 (*ante* page 13); so that all the English cases given above are on "all-fours," like the present case. The English statute of 1732, page 9 *ante*, provided: "And in case any such bankrupt shall afterwards be ar- "rested, *prosecuted or impleaded*, for any debt" provable, such bankrupt shall be discharged upon common bail, and shall and may *plead in general that the cause of action did accrue before bankruptcy, and may give this act and "the special matter in evidence.*" Dropping the provision in reference to imprisonment, we have it, that if such bankrupt be prosecuted or impleaded, he may plead in general that the cause of action accrued before bankruptcy, and may give this statute, which provides for his discharge from such debts, in evidence. These provisions, with the general provisions of the whole act, gave him the right to stay proceedings.

The statute of 1825, page 11 *ante*, contains the same provision in reference to the discharge of defendant from arrest; and the same right to plead the statute in answer to such debt, the language being, if he shall "be arrested or "have any action brought against him." In these statutes, therefore, it was not expressly made unlawful for the plaintiff to proceed with his suit, pending bankruptcy proceedings, but the right was given the defendant to obtain a stay, and therefore these statutes are like that of 1867 in legal effect, upon the point we are discussing.

The English cases, therefore, are an answer to the position, that if the power or privilege of obtaining a stay of proceedings is given to the bankrupt and he fails to exercise such power or privilege, and fails to obtain such stay, he loses the right of discharge from the debt in question.

The statute of 1841, pages 12 and 13 *ante*, omitted the provision previously given from the English statutes. It contains no provision making it expressly unlawful to prosecute a suit against a bankrupt pending his bankruptcy proceedings, or giving the right of stay, but simply provides that he shall be discharged from all his debts, and that such discharge may be pleaded in avoidance of all his debts. Under this act arose the sixteen cases above cited, in which the party did prosecute his suit to judgment notwithstanding the provision of the statute for his discharge, and in which the court released the defendant from the operation of such judgment. If a provision, for the benefit of the defendant, had been insrsted, to the effect that he might protect himself by obtaining a stay, would such provision have acted as a limitation, and a lessening of his rights, under the statute. Then comes the act of 1867, which enlarges the provision for the protection of the bankrupt, by making it unlawful to prosecute any suit against him, and which makes it imperative on the court to stay all such proceedings on his application, and which discharges him from all debts, provided he complies with other conditions of the statute.

NONE OF THESE EXPRESS PROVISIONS OF THE STATUTE FOR THE PROTECTION OF THE DEFENDANT ARE NECESSARY, BUT THE COURT WOULD GRANT HIM THE SAME PROTECTION UPON THE DOCTRINE OF THE CONSTRUCTION OF STATUTES, WITHOUT SUCH SPECIAL PROVISIONS.

How does a man get the right to sue his neighbor, and prosecute his suit to judgment and sale? Certainly from the law. Repeal all law and he would have no such right. The organization of courts and the remedies therein provided are all the results of law. Now these laws being in existence the legislature steps in and provides that any person entangled with debts may be adjudicated a bankrupt, and that the law will take charge of his effects and divide the proceeds equally among the creditors, and discharge the bankrupt from the harassment of them all. This general system supersedes the former race of diligence between individual creditors, and is absolutely repugnant to the existence of such a system. Being repugnant the two cannot be in force together. If the right to sue and prosecute his suit remains to one, it remains to all. After the new system has come into force, if then the right to have judgment, and execution and sale to one and to all remains, we would have one system which should take all a man's property from him and sell it, and give the proceeds all to one creditor, or in order to the most diligent, and another which should at the same time keep all this property *in custodia legis*, and sell it all, and give pro rata to each, and discharge the defendant. Nothing could be more inconsistent and absolutely repugnant than these two opposite provisions. They could not both be in force and operation at the same time.

Now it is a principle of construction that when two provisions are thus inconsistent and repugnant, when they cannot both prevail, the last repeals the former, so far as this repugnancy exists. Again: When a special remedy is followed by a general revision of the whole subject, the revision must prevail over the special remedy. Therefore, without a special statute authorizing his discharge the bankrupt would always have the right to apply to relief from arrest, or for a stay of any proceedings being prosecuted against him, without a special statute authorizing such stay, and by the introduction of the bankrupt statutes and the facts in evidence, it would be the imperative duty of the court to release the prisoner upon the ground he was already discharged from the debt, and to stay the proceedings on the ground of the incompatibility of the two remedies and of its duty to give efficacy to the last.

Unlawful Acts.

What shall a man gain, before our highest judicial tribunal, by prosecuting to final judgment a suit he is prohibited, by the highest legislative authority, from prosecuting at all, or what shall a man profit in law, before a court, by an unlawful act?

Our opponents say the measure of his profit shall be the full measure of the judgment thus unlawfully obtained; we say, nothing.

In no department of the law is a man rewarded for an unlawful act. He is not even entitled to legal protection while performing it. In the criminal laws, an unlawful

act becomes a crime, when the same act, if lawful and accompanied by the same consequences, would not be a crime.

In Illinois, for instance, it is made unlawful for a foreign corporation to hold real estate, except under circumstances named. Suppose a foreign corporation buys real estate here, not within the exception, for half its value, and sells it for double its value, has it got ahead any? Our Supreme court has frequently decided, under such circumstances, that the deed conveyed nothing to the corporation, and the corporate deed conveyed nothing to the purchaser, because the transaction was *mala prohibita*.

Laws formerly prevailed in many States making it unlawful for people of color to acquire or hold real estate. Under such circumstances the title did not pass to such person of color by a conveyance to him.

Jurisdiction is not given to a justice of the peace in actions on the case, but, as the old saw has it, the justice knew he had jurisdiction in slander, for he had tried a great many cases. He meant, speaking more accurately, that he had gone through the forms of trying them, and not that he had tried them.

If one is pursuing an unlawful occupation he cannot be slandered or libeled of and concerning him in that occupation. One may speak or publish of another that he cheats or robs in his unlawful lottery, or gambling-hell, or house of ill-fame, and if an action is brought, the plaintiff learns that he is not entitled to the usual legal remedies because of such unlawful employment.

"I think," said a learned judge in *Trissarri* v. *Clement*,

3 Bing., 336 *m*, "when a man complains of a libel written "respecting an illegal transaction in which he is engaged, "the illegality of that transaction is an answer to his com- "plaint."

Hunt v. *Bell*, 1 Bing., 1.
Marsh v. *Davidson*, 9 Paige, 579.
Cheney v. *Goodrich*, 98 Mass., 224.
Greville v. *Chapman*, D. & Meriv, 552.

If one has unlawful ownership and possession of a domestic animal, it may be taken by a stranger, and the law will not lend its process, in trover, to recover it, because he is entitled to neither the right of property nor the right of possession. If one is unlawfully in your Honor's house, what were otherwise a trespass may be committed upon him, and he be forcibly ejected, and no action will lie for the supposed trespass.

I may fill my house with stolen goods, and a thief "break through and steal." I become lawful prey, for it can never be averred and proven in a court of law that such goods were my goods and chattels. If a man doing a lawful act from which, without malice, another is killed, no punishment attaches; but if a man is pursuing an unlawful undertaking, and life is lost, though never so innocently, the law will hold him responsible.

In the whole domain of law, this distinction prevails, and shall it all be overturned to enable Ball to collect his debt? By doing the prohibited act of prosecuting this suit to judgment, does he acquire the right of payment in full out of new assets when the man who obeys the law and abandons his suit gets only a *pro rata*? Can the law be thus evaded? Can a man lift himself by his boot

straps; or does not such a lift counterbalance itself, and is he not after all simply where he was?

The statute given on page 15, *ante*, is:

"No creditor whose debt is provable, (Ball's debt was "provable), shall be allowed to prosecute to final judgment "any suit, at law or in equity (Ball's was a suit in equity), "therefor against the bankrupt (Boynton was a bankrupt) "until the question of his discharge has been determined." Before adjudication and after discharge this legal inhibition does not exist, and any plaintiff is permitted the free use of all legal remedies.

Mr. Ball, having a claim pending in the district in which Boynton was adjudicated a bankrupt, and having been personally served with notice of such proceeding, and served by legal publication, did prosecute his suit to judgment, while other creditors obeyed the law and got only a *pro rata*, and hence we say his judgment should not be paid in full, out of new assets, but that said judgment falls after all under the ban of unlawful acts, and must be treated like other unlawful acts.

THE TWO CASES OF NORTON, ASSIGNEE VS. SWITZER AND DIMMOCH VS. REVERE COPPER CO., GIVEN AT LENGTH ON PAGE 86, ANTE, CONSIDERED TOGETHER, SETTLE THIS QUESTION IN THIS COURT, AND DECIDES NEARLY THE WHOLE LAW OF THE SUBJECT.

In *Norton, assignee* v. *Switzer*, the court recognizes, based upon the statute, the doctrine that when the defendant in any case becomes a bankrupt *he is dead or civiliter mortuis*. In any litigation that may arise he cannot appear in court and plead and defend, any more than

a man who has been served with process, and dies naturally, can come back from over the river and still represent himself in his litigation. In the one case the man has died "very dead," and in the other, having proved himself a failure in the management of his estate, the law takes that estate with all its legal questions into its hands for the purpose of closing them. The dead man has an administrator to represent him, the bankrupt has an assignee, and he "may prosecute and defend all suits at "law or in equity pending at the time of the adjudication "of bankruptcy."

In construction of the above clause and this question, this court says (3d of Otto, 905):

"The 14th section of the Bankrupt Act provides, "to the effect, that all the properties of the bankrupt of "every kind, including property conveyed by the bankrupt in fraud of his creditors, and all rights of action, "shall, in virtue of the adjudication of bankruptcy, and "the appointment of his assignee, be at once vested in "such assignee, and that the assignee may sue for and "recover the said estate, debts and effects; and may prosecute and defend all suits at law or in equity pending at "the time of the adjudication of bankruptcy, in which "such bankrupt is a party, in his own name, in the same "manner and with like effect, as they might have been "prosecuted or defended by such bankrupt. 14 Stat. at "L., 522, Sec. 14; 14 Stat. at L., 523.

"Except where the amount is in dispute, no creditor of the bankrupt is allowed to prosecute his "suit, whether at law or in equity, to final judgment, "until the question of the debtor's discharge shall "have been determined; but the provision is, that "if the amount due the creditors is in dispute, the

"suit may, by leave of the court in bankruptcy, pro-"ceed to judgment for the purpose of ascertaining the "amount due; in which event the amount recovered may "be proved in bankruptcy, but the execution must be "stayed to await the determination of the question of dis-"charge." 14 Stat. at L., 527, Sec. 21.

By the text of this section, all of the powers possessed by the defendant are conferred upon his assignee, and this assignee seems to stand for him in every regard. Thereafter the two cannot both possess the powers conferred upon them. The giving of such powers to the assignee is by all rules of construction an exclusion from the exercise of them by the bankrupt.

For instance, the bankrupt before his adjudication could sue for and recover his property. After adjudication his assignee may do this, but the bankrupt cannot. So before bankruptcy he might prosecute and defend his own suit, but thereafter this power is vested in his assignee. Even powers which the bankrupt did not possess are granted to the assignee. He is empowered to sue for and recover property conveyed to the bankrupt in fraud of his creditors, thus showing that he is to act for the bankrupt, in all respects, and as his powers are in exclusion of those of the bankrupt. Both cannot act. Both need not be made parties, but in a suit pending at the date of bankruptcy the assignee must be made the party defendant, and thereafter the suit should be prosecuted against him.

The suit in the case at bar was pending at the time Boynton was adjudicated a bankrupt, and he had been served with process, but the assignee never was served or lawfully made a party thereto.

The court decides:

First. That except where the amount is in dispute no suit of any character can be prosecuted against the bankrupt.

In the case at bar it cannot be contended that the object was to settle the amount of a disputed debt. Ball, in 1865, obtained a decree against Boynton for $6,223.99. He had neglected to have an execution issued within a year, and his decree had, under the Illinois statute, become outlawed (page 2 *ante*). He commenced a new suit on the old decree to obtain a judgment. All he had to do was to introduce the old decree and calculate the interest on $6,223.99 from the date of its rendition to the date of his judgment. This was not a difficult sum in arithmetic. The old decree was just as definite and just as good for every purpose, except that it had not the gaffs of the right of an execution attached.

Second. Where the amount is in dispute a suit may be prosecuted to determine *solely* the amount due, provided after service upon the defendant, when the bankrupt has become *civiliter mortuis*, his assignee is legally made a party.

In Boynton's case he was served with process prior to September, A. D. 1877—see record, page 1—but the assignee was never substituted in his stead by order of court, or in any other legal manner was he made a party to such suit.

Third. Finding, in the case of *Norton, assignee*, v. *Switzer*, that notice in due form had been first given to the assignee, after service had once been had on the defendant, the court recognizes the right of the plaintiff, under the bankrupt statute, to prosecute his suit for the "*ascertain-*

"*ment of the amount due the creditor and as a basis of* "*dividends, but it is effectual and operative only for that* "*purpose, the express requirement of that section of the* "*bankrupt act being that execution shall be stayed.*" The case at bar occupies a position no stronger, than if the assignee had been served and the court had by order permitted a prosecution as the basis of dividends. It does not occupy a position so strong, for the assignee not having been served, the proceedings pending bankruptcy are simply a nullity.

The case of *Dimmock* v. *Revere Copper Company* decides that in a suit in another state upon transcript, to inquire whether the debt named in such transcript existed, upon the trial of a cause which had been already tried, and that point already decided, by a court having jurisdiction of the question and the person, and such proceedings were had *after the discharge*, such discharge cannot be pleaded in bar in such suit. The suit, under such circumstances, was prosecuted after the inhibition making such proceedings unlawful had expired.

There is no law against suing a man when he does not owe one, or getting judgment upon a false or fictitious claim, and such judgment being by operation of law vitiated. The defendant, under such circumstances must take care of himself. A judgment thus obtained is as veritable as any other, as long as it is permitted to stand; or, as this court properly decides: "It is clear that until "the judgment of the Massachusetts court is set aside or "annulled by some direct proceeding in that court, its "effect cannot be defeated as a cause of action when "sued in another state."

As to whether if such attack had been made upon that

judgment, in Massachusetts, in the court which entered it, asking that it be set aside on the ground that the debt had been discharged, by a discharge in bankruptcy, the court gives no opinion and this is the only open question left. As that question is not our question, we pass it.

THE DEBT OF BOYNTON WAS NOT FIDUCIARY AND THEREFORE WAS BARRED BY HIS DISCHARGE.

The original debt of Boynton to his brother was a partnership debt, and this in no sense would be fiduciary; besides it was not fiduciary to Ball the opposite party in these proceedings, which must be the case to enable him to set up its fiduciary character against Boynton's discharge of bankruptcy. Boynton, having received certain money from his brother, agreed to enter land in partnership and account to that brother for a certain share of the profits. Ball having a judgment against the brother filed a creditor's bill against such brother and Boynton, the plaintiff in error, in which he alleged the contract as stated above, and that Boynton, the plaintiff, owed money to the brother against whom Ball had obtained his judgment. Therefore Ball held originally a debt against Stewart G. and Wallace Boynton, which might or might not have been fiduciary, but it was not this debt. Ball converted that indebtedness into a decree in chancery, which was obtained against Charles W. Boynton, the plaintiff, and it is a judgment upon that decree, which, with the interest, amounts to about $15,000, that the defendant now claims from the plaintiff in error.

In the case of *Walcote* v. *Hodge*, 82 Mass., 547, DEWEY, J., held in reply to the discharge in bankruptcy granted by the District court of the United States, and set up as

a bar to recovery in that case, that such a debt being the debt of an attorney for moneys collected was an ordinary debt and not fiduciary. "The plaintiff relies upon the exception in that statute of all debts which shall have been "created in consequence, as a defalcation as a public officer or as executor, administrator, guardian, trustee, or "while acting in a *fiduciary capacity*. The facts present "the ordinary case of an indebtedness, created by the collection of a debt or other demand by an attorney at law "for his client and who has neglected or refused to pay "the same to his employer. The decided cases in relation to the debt of the factor who had sold the goods "of his principal and received the money therefor seemed "to settle the present question."

As this point has not been made either by our adversaries *or any of the courts* hitherto, we will not pursue the inquiry further. We mention it simply because this suit, having once fallen into the ruts of bad luck, we do not know how long it will stay there.

Merger.

Merger means the passing of the inferior into the superior, and there is no such thing as the merger of equal securities into equals, or the merger of one judgment into another by the process of revival.

Merger is defined by Bouvier, Vol. II, title Merger: "The absorption of a thing of lesser importance by a "greater, whereby the lesser ceases to exist, but the "greater is not increased."

In *Munford* v. *Stokes*, 1 Cowen, 173, it was moved to enter satisfaction on a judgment recorded in the Supreme

court on the ground that the plaintiff had perfected a judgment upon this judgment, in the Seneca Common Pleas, and the court said, "the motion must be "denied. The judgment of the Common Pleas was not an "extinguishment of the judgment here. Both debts are "of equal degree. The satisfaction cannot be entered "upon motion, upon the ground of a recovery in another "court until the judgment there in fact is satisfied."

In 9th Watts, page 280, in *Weekly* v. *Bell & Sterling*, the court say: "And most clearly all the authorities go "to show that at law accepting a security of equal de- "gree, either from the debtor himself, with or without "security, or from a stranger alone, at the instance of the "debtor, is no extinguishment of the first debt, as where "a second bond is given to the obligee, for one bond "cannot determine the duty of another."

Cro. Eliz., 304, 716, 727.
1st Burr, 9.
1st Strange, 427.
1st Mod., 225.
2d Mod., 136.
Cro. James, 579.
3 Lev., 55.

The case of *Andrews* v. *Smith*, 9th Wend., 54, was one wherein Andrews obtained a judgment in one of the ward courts of New York against Smith, upon which he commenced suit against Smith in a justice's court in the county of Kings, and obtained judgment. On this last judgment Andrews caused an execution to be issued, on which Smith was arrested and imprisoned, and after thirty days discharged. Subsequently Andrews sued out an execution on the first judgment, and levied upon certain property

of Smith, who sued Andrews and the officers in trespass for taking such property.

Opinion of the court by SAVAGE, C. J.:

"The only question in this case is whether a judgment "before a justice rendered upon a judgment before an- "other justice extinguishes the judgment first obtained. "As to judgments in courts of record the question has "been settled in the negative. 11th Johnson's Rep., 515; "5th Wend., 129 222. The general principle of law gov- "erning in cases of this kind, and which applies to all se- "curities, is, that a security of a higher nature extin- "guishes inferior securities, but not securities of an equal "degree." Upon this same question the court, in the case of *Jackson* v. *Shaffer*, 11 John., page 516, says: "The "bond and warrants of attorney, and the judgment entered "thereon were not a security of a higher nature than the "former judgment, and where a creditor takes a new se- "curity of an equal or an inferior degree, it is not an ex- "tinguishment of the original debt." Citing *Manhood* v. *Crick*, Cro. Eliz., 718, 6 Coke's Rep., 44; *Phelps, Admr.*, v. *Johnson*, 8th John. Rep., 54."

FREEMAN, in his work on judgments, says, page 216:

"Some American cases, proceeding upon the theory "that no merger can take place until some higher rem- "edy or evidence is created, deny that one judgment can "merge into another of equal degree."

In *Preston* v. *Perton*, Crokes' Eliz., 817. Preston recovered judgment in the court of King's Bench against Perton: and afterwards brought debt upon the judgment in the common pleas, and had judgment there. He then brought *scire facias* in the King's Bench to have execu-

tion upon the first judgment. The defendant pleaded in bar the recovery in the common pleas to which there was a demurrer; and all the court held it to be no plea because one judgment cannot determine *another* judgment which is of equal nature.

In *Weeks* v. *Pearson*, 5 N. H., 325, the plaintiff recovered judgment in New Hampshire. He then brought an action of debt upon that judgment in the State of New York and had judgment there. After this he brought an action of debt upon the first judgment, in the former state, to which the defendant pleaded in bar, the judgment rendered in New York.

It was held that the plea was no answer to the action.

The court say: "The reason why a former recovery "for the same cause is a bar to a second action is, that "the cause of action has passed, *in rem judicatum*, and "is determined by the judgment. But this reason does "not exist where there has been a recovery in another "state in debt upon a judgment rendered here. For one "judgment being of as high a nature as another, a judg-"ment in another state cannot extinguish or determine a "judgment rendered here."

There are also other authorities which take an opposite view of this question.

The history of the doctrine of merger as affecting the right of a defendant to a discharge in bankruptcy, in reference to a debt from which he was otherwise discharged, may be found in the cases in bankruptcy given heretofore in this argument.

The first English bankrupt act was passed in 1772, page 9, *ante*; the second in 1806, the third in 1809, and

the fourth in 1825. The first bankrupt act in America was passed in 1841. (12 *ante.*) Under all these acts cases constantly arose in which a claim or liability had been put into a judgment pending the proceedings, and yet it seems that this question of merger, as a ground for the non-discharge of the debt, did not arise and was not thought of until the case *Johnson* v. *Fitzhugh*, the 3d of Barber's Chy. Rep., page 33 *ante*, in 1848, or for a period of more than seventy-five years. The English courts, which understood well the doctrine of merger, notwithstanding the debt before them had in every case merged, and yet neither courts nor lawyers ever thought of this question. When it did arise it was held that notwithstanding the merger, the judgment which was identical with the debt was barred by the discharge, or that the original could be proved. It is not until very recently that the new doctrine of merger and a new debt, has prevailed anywhere, and in so few cases that they may well be termed sporadic.

But the question is not really one of merger. The law does not read the defendant shall be released from all his debts, *except those which have been hid in a merger.*

The question is one of identity. Can the original debt be traced, and does the new judgment represent anything but the new debt?

In the case at bar it literally represents the old debt, and nothing but the old debt. The declaration (Rec., 2) sets out the first judgment, how much it was, and that it had never been paid. The court, in the month of December, A. D. 1879, gives a judgment for the amount of this old decree, and the interest which is fixed by statute. The second judgment is the same old body, but is simply covered with a new armor.

The old decree had, by the plaintiff's negligence, outlawed, and he simply got it repaired. He had it figured up to a certain date, all due on the old entered into the new, with the right to issue an execution attached. He simply took the old judgment and had new gaffs put to it.

We respectfully submit, in the language of Mr. Justice BLATCHFORD *in re* Stephen Brown, page 45 *ante*, that *the 19th section of the act declares* "*that all debts due and* "*payable from the bankrupt at the time of the adjudica-*"*tion of bankruptcy, and all debts then existing but not* "*payable until a future day, may be proved against the es-*"*tate of the bankrupt.* If the debt in this case existed at "the time of the adjudication, it is provable, although the "judgment is not provable as such, because it did not "then exist. The debt has never been paid or satisfied. "This must be the proper construction under the act, or "the provisions of section 21 of the act are nugatory. "That section provides that when a suit is pending by a "creditor against the bankrupt for a debt or claim, if the "amount due the creditor on or for the debt or claim is "in dispute, the suit may, by law of the bankruptcy "court, proceed to judgment for the purpose of ascer-"taining the amount due on or of the debt or claim, and "that such amount may be proved in bankruptcy. The "judgment, as such, is not to be proved, but the amount "of the debt or claim as it stood at the time of the ad-"judication, is to be proved. If the fact of obtaining the "judgment extinguishes the debt, the amount of the debt "could not be proved. I think the clear intent of the act "is that the recovery of a judgment after the adjudica-"tion on a debt which existed at the time of the adjudi-"cation, shall not affect the provability of the debt."

Boynton was adjudicated a bankrupt on the 15th day of April, A. D. 1878. He was discharged the 23d day of December, A. D. 1880. The second judgment was obtained the 9th of December, A. D. 1880. During all the time between the 15th of April, 1878, and the ninth day of December, 1880, a period of two years and a half, this debt might have been proved at any time at Chicago. It was only after the time for proving the debt had expired, and fourteen days before the discharge, that the debt, if ever, was merged. The defendant knew of the existence of the bankruptcy proceedings. His claim was scheduled, and he was notified of the proceedings, but deliberately elected to take his chances by the unlawful procedure of obtaining a judgment.

LEONARD SWETT,
EDWARD R. SWETT,
For Plaintiff in Error.

SWETT, GROSSCUP & SWETT,
Of Counsel.

121-457

IN THE

Supreme Court of the United States

October Term A. D. 1887.

No. 187.

CHARLES W. BOYNTON,
Plaintiff in Error.

vs.

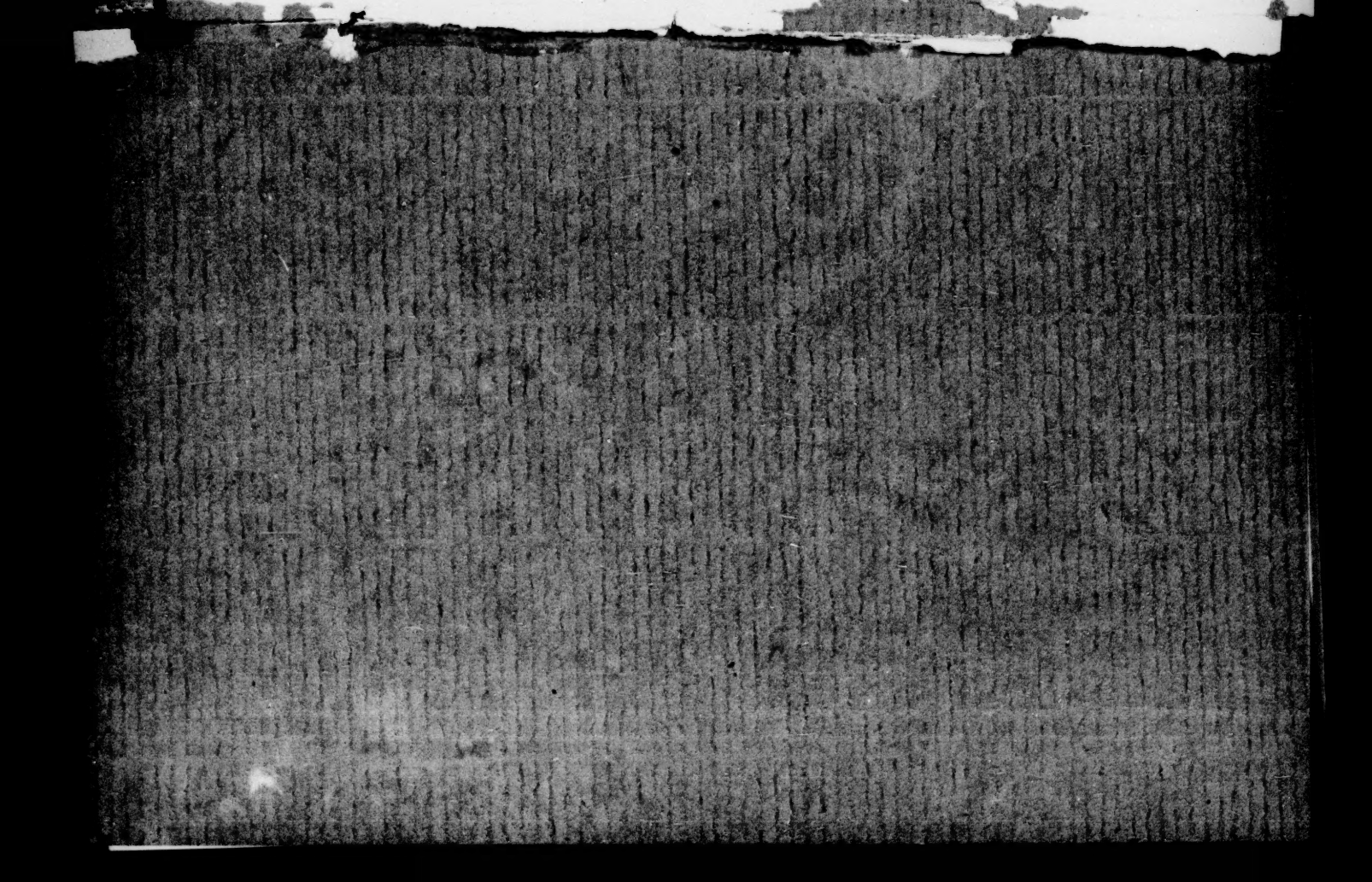
PLOWDEN H. BALL,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

Argument for Defendant in Error.

J. A. CRAIN,
Attorney for Defendant in Error.

Thomas McGill & Co., Law Printers, Washington, D. C.



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Defendant in Error.

Argument for Defendant in Error.

MAY IT PLEASE THE COURT:

We place before your Honors a concise statement of

THE FACTS.

At the September Term, 1865, of the Stephenson county Circuit Court of Illinois, in a proceeding by creditors' bill at the suit of Plowden H. Ball and Edgar F. Griffin against Charles W. Boynton *et al.*, a money decree was passed against Charles W. Boynton for $6,223.99, and awarding execution.

Record, pp. 4, 5, 6, and 7.

After which decree Griffin departed this life.

Record, p. 25.

Afterwards, on 16th day of April, 1877, an action of *Debt* by Ball as survivor was commenced in said court on that decree; summons was issued, and by the sheriff personally served on Boynton.

Record, pp. 1 and 2.

Afterwards, on 19th March, 1878, at the March Term of said Circuit Court, defendant Boynton was ruled to plead by the then next following Monday morning.

Record, p. 7.

Afterwards, on 4th April, 1878, the defendant filed his plea of the general issue, and the plaintiff by *similiter* joined issue thereon.

Record, p. 8.

Thereafter, on 15th April, 1878, Charles W. Boynton filed his petition in voluntary bankruptcy in the Northern District of Illinois, and was adjudicated a bankrupt on that same day.

Record, pp. 14, 15, and 16.

The action of *Debt* against Boynton on the decree stood without anything further being done therein until the 9th day of December, 1879, when the following proceedings between the parties were had and entered of record, to wit:

"In the Stephenson County Circuit Court of the December Term A. D. 1879.

'PLOWDEN H. BALL, as Survivor of EDGAR F. GRIFFIN, Deceased, Plaintiff, *vs.* CHARLES W. BOYNTON, Defendant. } Debt.

'And now on this day *comes here into court* the said plaintiff, by J. A. Crain, his attorney, *and the said defendant, by James I. Neff, his attorney; and a jury having been by the parties hereto waived, and the issues herein now submitted to the court for trial thereof, and said cause having now here been called for trial upon the issues joined*, and the court having now heard the evidence adduced, does now here find said issues for the plaintiff, and that said defendant is indebted to said plaintiff in the sum of six thousand two hundred twenty-three $\frac{99}{100}$ dollars debt, and that said plaintiff's

'damages, by reason of the non-payment of said debt, 'are the sum of five thousand two hundred thirty-four '$\frac{99}{100}$ dollars.

"Wherefore it is now here by the court considered 'that said plaintiff have and recover of said defendant 'his said debt of six thousand two hundred twenty-'three $\frac{99}{100}$ dollars, together with his said plaintiff's 'damages, assessed at said sum of five thousand two 'hundred thirty-four $\frac{99}{100}$ dollars, and his costs in this 'case; and that said plaintiff have his execution for 'said debt and for said damages, together with his said 'costs.

'JOHN V. EUSTACE, *Judge*."

Record, p. 26.

Having been adjudicated bankrupt "on or about" 16th April, 1878, as shown *by his own affidavit*, though he had been personally served in the action and knew his suit was pending, he never took even the trouble to procure the certified copy of the order of his adjudication as a bankrupt, which he swears he sent his brother, until the 18th of April, 1879—*a year and two days' delay*.

See Boynton's affidavit, Record, p. 13.

On 18th April, 1879, he swears he forwarded from Chicago, to his brother in Freeport, this certified copy of his adjudication, "with instructions to hand the same to 'Henry C. Hyde, or some other attorney, to go into court 'and move for a stay of proceedings;" that he did nothing further, and that he heard nothing from his brother until 20th December, 1880, a further delay of over eighteen months, when he first learned from him that he had done nothing—making a space of time, from the date he was adjudicated bankrupt on 16th April, 1878, to the day he heard from his brother, of *two years eight months*.

Record, p. 13.

That at the time he filed his petition in bankruptcy he resided in Chicago, Ills., and that the court in which said action of debt was pending was held at Freeport, Ills., distant from his residence 121 miles by easy daily railway travel, and between which places there was daily mail and hourly or less telegraphic communication.

Record, pp. 25 and 26.

He obtained his discharge 23d December, 1880.

Record, p. 22.

He filed this, his Petition for Perpetual Stay of Execution, 25th March, 1881.

Record, p. 11.

A concrete summary of the facts, law, and question in the case at bar is as follows :

Ball brought his action against Boynton in a State court, and declared against him in an action of *Debt* on a money decree theretofore passed against him, upon upon which execution had never issued, to which action Boynton pleaded the *general issue*, the plaintiff joining issue thereon.

Afterwards Boynton filed his Petition in Bankruptcy in U. S. District Court for the proper district, scheduling, among his other debts, the decree sued on ; and was on same day adjudicated a bankrupt ; but he took no steps to apprise the State Court of his pending bankruptcy ; put in no plea setting up his bankruptcy, nor took any measures or made any application for a Stay of proceedings in the State Court to await the determination of the court in bankruptcy on the question of his discharge; and nothing whatever was done by Boynton after the filing his said plea of *general issue* in his case in the State Court until over *nineteen months* had elapsed after he had been adjudicated bankrupt; when he *then* came into the State Court, and *without any intimation whatever to that court of his bankruptcy proceedings, actually joined the plaintiff in waiving a jury and submitting the case for trial by the court on the issue so first as aforesaid formed ;* whereupon a trial was then and there had, the issue found for the plaintiff, and Judgment rendered against Boynton; and soon after plaintiff took out execution on this last Judgment; which execution, costs having accrued on it, was returned *nulla bona.*

After a further delay from the rendition of the judgment of over *twelve months*, Boynton obtained his Discharge.

Record, pp. 25, 26, and 27.

Ball's debt was provable, but he has *never* proved it in the bankruptcy proceedings, nor has he in any way or manner ever connected himself therewith, or taken any part therein.

Boynton, after a lapse of *nearly three years* from the day he was adjudged bankrupt, now files his Petition in the State Court where this last judgment was obtained, praying a perpetual stay of execution upon *it*, grounding his Petition on his Discharge in bankruptcy.

The Circuit Court denied his petition; whereupon he appealed to the Appellate court of that State, which affirmed the judgment; he again appealed to the Supreme Court of Illinois, which by its opinion, to be found in the Record, pages 38–43, affirmed the appellate court's judgment; whereupon he brings in this court his writ of error to the Supreme Court of that State.

The Law.

(Revised Stats. U. S. 1878.)

"SEC. 5106. No creditor whose debt is provable 'shall be allowed to prosecute to final judgment any 'suit at law or in equity therefor against the bank-'rupt until the question of the debtor's discharge shall 'have been determined; *and any such suit or proceedings 'shall, upon the Application of the bankrupt, be Stayed 'to await the determination of the Court in Bankruptcy 'on the question of the discharge*, provided there is no 'unreasonable delay on the part of the bankrupt in en-'deavoring to obtain his discharge, and provided, also, 'that if the amount due the creditor is in dispute, the 'suit, by leave of the Court in Bankruptcy, may proceed 'to judgment for the purpose of ascertaining the amount 'due, which amount may be proved in bankruptcy, but 'execution shall be stayed."

"SEC. 5117. No debt created by the fraud or embez-'zlement of the bankrupt, or by his defalcation as a 'public officer, or while acting in any fiduciary charac-'ter, shall be discharged by proceedings in bankruptcy; 'but the debt may be proved, and the dividend thereon 'shall be a payment on account of such debt." Incut see 5118

"SEC. 5119. A discharge in bankruptcy duly granted 'shall, subject to the limitations imposed by the two

'preceding sections, release the bankrupt from all 'debts, claims, liabilities, or demands which may or 'might have been proved against his estate in bank-'ruptcy." * * *

Question.

It will be readily seen that on the first above-stated Facts, the question is, did the neglect of Boynton after he had gone into bankruptcy to make a timely Application, as required by above Section 5106 for Stay of proceedings of the State Court, but, on the contrary, his consent to that court's further proceeding with his case by joining plaintiff in submitting it for trial and trying it in that court, resting his defense wholly upon other grounds, whereby he allowed Judgment to be entered against himself in that court, constitute such *laches* on his part that he cannot be now heard to set up his Discharge as against the Judgment so obtained?

Sec. 14 of 49 Geo. III, Chap. 121, quoted by plaintiff in error, p. 10 of his Argument, prohibits any creditor who shall have brought action or instituted suit against a bankrupt, on any demand arising *prior* to bankruptcy, or which might have been proved, from proving a debt unless on condition of relinquishing such suit or action.

So, also, Sec. 59 of 6 Geo. IV, Chap. 16, quoted in plaintiff's Arg., p. 11, is to same effect.

Sec. 5 of the Act of Congress 1841, cited by plaintiff's Arg., p. 13, provides that no creditor coming in and proving his debt shall be allowed to maintain any suit therefor, but shall be deemed to have waived all right of action; and it declares as the effect of so proving all actions commenced, and unsatisfied judgments already obtained, surrendered.

Sec. 5105 of the Act of 1867 is to precisely the same effect.

But inasmuch as Ball, the here defendant, has never proved his debt against Boynton the plaintiff in error, nor has Ball in any way or manner connected himself with Boynton's bankruptcy proceedings, it is submitted that all the above-mentioned sections have no bearing whatever on any question in this case.

Sec. 13 of 5 Geo. II, Chap. 30, enacts—

"That if any bankrupt, who shall have obtained his 'or her certificate from the acting commissioners, and 'such certificate shall have been allowed and confirmed 'as by this act is directed, shall be taken in execution, 'or detained in prison, on account of any debts due or 'owing before he or she became bankrupt, by reason 'the judgment was obtained before such certificate was 'allowed and confirmed, it shall and may be lawful for 'any one or more of the judges of the court, wherein 'judgment has been so obtained against such bankrupt, 'on such bankrupt's producing his or her certificate 'allowed and confirmed, to order any sheriff or sheriffs, 'bailiff or other officer, gaoler or keeper of any prison, 'who hath or shall have any such bankrupt in his cus-'tody, by virtue of any such execution, to discharge 'such bankrupt out of custody on such execution with-'out payment of any fees or reward; and such sheriff 'or sheriffs, bailiff or other officer, gaoler or keeper is, 'and are hereby, required to discharge such bankrupt 'out of custody accordingly, and is, and are hereby, 'indemnified from any action for an escape for his or 'their so doing."

The 34 & 35 Henry VIII, Chap. 4, enacted in 1542, was the first bankrupt act. Its preamble is as follows:

"Whereas, divers and sundry Persons craftily obtain-'ing into their hands great substances of other Men's 'Goods, do suddenly flee to parts unknown, or keep 'their Houses, not minding to pay or restore to any of 'their Creditors their Debts and Duties, but at their 'own Wills and Pleasures, consume the Substance 'obtained by Credit of other Men for their Pleasure and 'delicate Living, against all Reason, Equity, and good 'Conscience; therefor[illegible]e in enacted, etc."

Every succeeding act up to 4 & 5 Anne, Chap. 17, contained like severe denunciations against this class of delinquents.

The original English bankruptcy acts all proceeded upon the theory that the bankrupt was an offender—a sort of *quasi*-criminal, and created the remedy and pro-

cedure by bankruptcy in favor of the creditors, who thereby proceeded *in rem* against the property of the bankrupt. The bankrupt himself received no consideration from, nor had any protection by, those early statutes, and it was not until over two centuries after the enactment of the first of them that the bankrupt could derive any advantage whatever from his bankruptcy; his estate was seized and distributed among his creditors, but he received no part of, nor had any exemptions in, it; he could be sued, arrested, and imprisoned precisely as though no bankruptcy proceedings had ever been had, and judgments could be and were constantly taken against persons then in bankruptcy.

By this last-mentioned act it is provided that if the bankrupt has fully turned over all his estate to his creditors, and made full disclosure, he shall have a certain allowance or Exemption, and shall also, having fully conformed to the act, be allowed a Certificate. This is the first statute giving either, and was continued into the more permanent act of 5 Geo. II, Chap. 30, where, by the 7th section of that act, a discharge is given from all debts by him owing at the time he became bankrupt; and in case he should, after having received his Certificate, be arrested, prosecuted, or imprisoned for any debt due before the time he became bankrupt, he was to be discharged on common bail, and might plead that the cause of action accrued before his bankruptcy.

As the bankrupt could be sued at any time after commission issued, just as well as before, but he could not set up his Certificate until he had obtained it, judgment would, of course, frequently be entered against him pending his bankruptcy upon his debts owing when he became bankrupt; so that out of the necessity of the case—because he had no Certificate to plead to such suits, and could obtain relief in no other way, and upon the practice arising upon the 13th section of that act—the English courts, in some measure, did establish a rule of allowing the Certificate as against this class of judgments, but it grew only out of the exigencies of the case.

No such provision, or anything having even a resemblance to Sec. 5106, is to be found in either the Bank-

rupt Act of 1800 (2 U. S. Stat. at Large, 19); or that of 1841 (5 U. S. Stat. at Large, 440); consequently, any decision predicated on those acts has no weight, and is of little authority in determining the effect of, and duties imposed on the bankrupt by, this new section in the act of 1867.

There was no way under the former acts by which, after a person had filed his petition, and was adjudicated a bankrupt, he could arrest the proceedings or suits against himself then pending, or which might be afterwards commenced, until he could get a discharge, and plead it in bar; consequently the courts strained and sought in every way to qualify the effect of "merger" of an old debt into a new one, by judgment obtained on such debt after petition filed in bankruptcy; and, in doing so, they put it on the ground as the reason for their rule that the bankrupt had had *no* opportunity to *plead* his discharge.

The court will bear in mind that this section was a new feature of the bankrupt law of 1867; it, nor anything like it, had ever existed, either in England or this country, and experience indicated, and justice demanded, that there should be some mode provided by which, when a suit was pending against a defendant (as was *Ball* v. *Boynton*), and he went into bankruptcy, that when adjudicated a bankrupt he could stay such suit until the question of whether he was to get a discharge should have been first determined.

The act created this privilege and defense, which, if defendant had then interposed in this case, the judgment in question never could, on his own theory of the effect of his discharge, have been recovered against him. His duty, after going into bankruptcy, is clearly pointed out in *Holden* v. *Sherwood*, 84 Ill., 94, where the defendant, after verdict, suggested his bankruptcy, and filed his discharge, but did nothing more.

It was there said that this was not enough; that he should have made a motion, based on the evidence filed, of his bankruptcy. But, say the court, "even if there 'had been a proper motion, it came *too late*, as the 'bankruptcy had occurred some five months before the 'trial. If we may look into the certificate of the register,

'(the bill of exceptions not having preserved it), the 'appellant should have made his motion for a stay of 'proceedings based on the transcript (of bankruptcy 'proceedings) before the cause was called for trial. He 'could not be permitted to lie by and permit the plain- 'tiff to incur the expense of a trial, and when it termi- 'nated in a verdict against him, *then*, for the *first* time, 'ask for a *stay* of proceedings."

Now, it is submitted, that case decides this; for in that case the very thing the defendant wanted done was to *stay* the proceedings—stay the verdict from becoming a judgment; he had waited some five months, and until *after* verdict, and this court denied his stay.

Boynton had been adjudicated a bankrupt over nineteen months *before* our judgment was obtained; and though he knew of the suit, did not apply for a stay on this suit, but he waits until fifteen months *after* our judgment; and by his motion filed in this case, 25th March, 1881—a delay altogether of but two months less than three years—now comes, and after we have gone further than the 84 Ill. case, got our judgment, and taken out execution, thereby incurring additional costs, now asks of this court to do in effect just what he might have done on the 18th day of April, 1878, or even afterwards on the 9th December, 1879, instead of submitting his case and going to trial, which, if done by him, the plaintiff would have obtained no judgment, been to no further trouble, nor incurred any further expense from that day.

The first case cited by plaintiff in error is *Boteflour* v. *Cortes*, 1 Cowp., 25, where the defendant had already obtained his certificate, after which judgment on a debt prior to his bankruptcy was rendered against him, and he was taken in execution; the English court in such case discharged him; and *because* those courts did so in such case, it is claimed the American courts must hold in like case the same way.

As the discharge in that case was *before* the judgment, the defendant could have then set it up by plea in bar of the judgment, but did not do so; yet the English courts discharged him; but it is obvious this practice could not, nor in fact ever did, obtain in this country,

where uniformly, since our very first act on the subject, the bankrupt having a certificate of discharge, has been required to plead it.

Fellows v. *Hall*, 3 McLean, 282.
Ib., 488.
Steward v. *Green*, 11 Paige, 537.
Manwarring v. *Kouns*, 35 Texas, 173.
Park v. *Casey*, 35 Texas, 537.
Lemner v. *Browning*, *17 Ohio*, *363*.
Horner v. *Spellman*, 78 Ill., 208.

Plaintiff's next case—*Blanford* v. *Froud*, 1 Cowp., 138—was, as the face of the opinion expressly states, a proceeding based on Sec. 2 of 12 Geo. III, Chap. 47, for continuing 5 Geo. II, Chap. 30, and "*For making pro-*'*vision for discharging bankrupts in certain cases from* '*their imprisonment.*"

The *certain* cases are found by reference to the body of that act, to have been—

Sec. 2. Bankrupts who were in custody on or before 25th March, 1772, *for any debt due before commission issued*, who had conformed to the bankrupt laws, &c., might, on petition and on their *making oath* that such debt or debts did accrue before the issuing of the commission, be discharged.

Sec. 3. Bankrupts against whom a commission had been issued before 25th March, 1772, who had submitted and conformed, &c., and who should, after that act had gone into force, be arrested and held to bail or taken in execution *for any debt or debts due and accruing before the date or dates of their respective commissions*, were, after forty days from their arrest, to be on *like* proceedings discharged.

It is at once apparent that the special class of bankrupts here designated, those having become such prior to 25th March, 1772, who had as yet obtained no certificate, and who, until their certificate had been received, could do nothing whatever to *prevent* judgments being rendered against them—*uncertificated* bankrupts, as the case describes them—as to such, if the law-making power saw fit to allow them, when taken in execution or imprisoned, on making oath that the debt or debts did accrue before the issuing of their commissions, etc., to

be discharged, certainly as was the fact in that case, even though a judgment they had no power to prevent had been rendered on the debt, they must necessarily have been discharged. It was a compliance on the part of the uncertificated bankrupt with the terms of the statute that discharged him out of custody. Under so sweeping a statute the court would, in the words of Lord Mansfield, "hold them within the bene-'fit of the act."

And as to both these cases they are short and unsatisfactory, and it will be well to remember that no less eminent a Chancellor than Lord Eldon characterized them as having been formed without sufficient attention to antecedent authorities.

11 Sumner's Vesey, 654.

We submit that the precedents established under a statute unlike any act of Congress ever existing here, establishes no principle that can be deduced from any bankrupt act ever in force in this country.

The appellant claims that by Sec. 5106 it is made *unlawful* to proceed against a bankrupt in a State court the moment he becomes such. By confining our attention to but the first part of that section, it might so appear, but the whole section is to be read together, and, in so reading it, we see that no creditor is permitted to proceed to judgment, *provided* the bankrupt sees fit to stay him.

In *Eyster* v. *Gaff*, 91 U. S. S. C., 524, where it was claimed that a certain mortgage forclosure was void because after bill filed, but before decree, the mortgagor went into bankruptcy, and without the assignee having been made a party, the State Court proceeded to judgment. The Supreme Court of the United States say:

"It is a mistake to suppose that the bankrupt law 'avoids of its own force all judicial proceedings in the 'State or other courts the instant one of the parties is 'adjudged a bankrupt. There is nothing in the act 'which sanctions such a proposition.

"The court in the case before us had acquired juris-'diction of the parties and of the subject-matter of the

'suit. It was competent to administer full justice, 'and was proceeding, according to the law which 'governed such a suit, to do so. It could not take 'judicial notice of the proceedings in bankruptcy in 'another court, however seriously they might have 'affected the rights of parties to the suit already pend-'ing.

"It was the *duty* of that court to proceed to a decree 'as between the parties before it, until by some proper 'pleadings in the case, it was informed of the changed 'relations of any of those parties to the subject-matter 'of the suit. Having such jurisdiction, and performing 'its duty as the case stood in that court, we are at a loss 'to see how its decree can be treated as void. It is 'almost certain that if, at any stage of the proceedings, 'before sale or final confirmation, the assignee had 'intervened, he would have been heard to assert any 'right he had, or set up any defense to the suit. The 'mere filing in the court of a certificate of his appoint-'ment as assignee, with no plea or motion to be made 'a party, or to take part in the case, deserved no atten-'tion and received none.

"In the absence of any appearance by the assignee, 'the validity of the decree can only be impeached on 'the principle that the adjudication of bankruptcy 'divested the other court of all jurisdiction whatever 'in the foreclosure suit.

"The opinion seems to have been prevalent in many 'quarters, at one time, that the moment a man is de-'clared bankrupt the District Court, which has so ad-'judged, draws to itself, by that act, not only all control 'of the bankrupt's property and credits, but that no one 'can litigate with the assignee contested rights in any 'other court, except in so far as the Circuit Courts have 'concurrent jurisdiction, and that other courts can pro-'ceed no further in suits of which they had, at that 'time, full cognizance; and it was a prevalent practice 'to bring any person, who contested with the assignee 'any matter growing out of disputed rights of property 'or of contracts, into the bankrupt court by the service 'of a rule to show cause, and to dispose of their rights 'in a summary way.

"This court has steadily set its face against this 'view."

In *Conner* v. *Long*, it is said this mistake, in supposing the bankrupt act of itself divested the State Courts of all power to proceed with a case the moment a party is adjudged a bankrupt, is again adverted to and condemned.

Boynton's 5th assignment of error in this case is as follows:

"5. The court erred in holding, as in effect it did, that notwithstanding a defendant is adjudicated a bankrupt, pending the litigation against him, he does not become *civiliter mortuis*, and may be proceeded against the same as if he had not been adjudicated a bankrupt, and the assignee need not be made a party; and *if the plaintiff is smart*, he can *evade* the law, and obtain a judgment which he can make in full, out of the new assets of the bankrupt obtained since his discharge, notwithstanding the bankrupt act itself makes the obtaining such judgment *an unlawful act*."

As against the above language, we cite the following paragraph from the opinion of this court in recent case of *Dimock* v. *Revere Copper Co.*, 117 U. S., [illegible]: 559

"The Superior Court of Massachusetts had jurisdiction of the suit of the Copper Company against Dimock, both as regards the subject-matter and the parties. This jurisdiction was rendered complete by service of process and by the appearance of the defendant. All this was before the beginning of the bankruptcy proceeding. Nothing was done to oust this jurisdiction, and the case accordingly proceeded in due order to the rendition of the judgment which is the foundation of this action. It is not argued that this judgment was void, or that the court was ousted of its jurisdiction by anything done in the bankruptcy court. No such argument could be sustained if it were made. In the case of *Eyster* v. *Gaff*, 91 U. S., 521, which was very similar to this on the point now before the court, it was said: 'The court in that case had acquired jurisdiction of the parties and of the subject-matter of the suit. It was competent to administer full justice, and was proceeding according to the law which governed such a suit to do so. It could not take judicial notice of the proceedings in bankruptcy in another court, however seriously they might affect the rights of parties to the suit already pending. It was the duty of that court to proceed to a decree between the parties before it, until by some proper

'pleadings in the case it was informed of the changed 'relations of any of the parties to the subject-matter of 'the suit. Having such jurisdiction, and performing 'its duty as the case stood in that court, we are at a loss 'to see how its decree can be treated as void.' "

Read Ball's name in place of the Copper Company and Boynton's instead of Dimock's, and comment on the above-assigned error is unnecessary.

It is submitted that a proper reading of the 5106 section of the bankrupt act is, that no creditor shall be allowed to prosecute to judgment any suit against a bankrupt until the question of his discharge is determined, *provided* the bankrupt applies for a stay of proceedings, etc.

In re Williams, 3 Bank Reg., 79, a suit had been commenced against Williams in a State court, who, pending that suit, filed his petition in bankruptcy, and was, on 13th January, 1868, adjudicated bankrupt. On the 6th February, 1868, no stay having been applied for, a judgment was rendered against him in the State Court.

The plaintiffs in this judgment afterwards sought to prove it against the estate.

SHIPMAN J.: "The most important question is, 'whether this judgment debt is provable against the 'estate of the bankrupt, and the judgment debtor has 'a right to a dividend thereon.

"On this point the authorities are numerous and 'decisive. A debt upon which a judgment of law is 'founded is merged in that judgment, and extinguished 'by it. The judgment constitutes a new debt, which 'takes its date from the time of the recovery.

"The debt, therefore, of L. W. Barlow & Co., upon 'which their suit was brought against the bankrupt, 'was extinguished by the judgment which they ob-'tained. It no longer existed. It has had no existence 'since the rendition of that judgment, and can never 'again be called into life. The judgment itself consti-'tutes a debt, but it had no existence at the time of 'the adjudication of bankruptcy, and is not, therefore, 'provable against the bankrupt's estate. (*Holbrook* v.

'*Foxes*, 27 Maine Rep., 441; *Pike* v. *McDonald*, 32 'Maine Rep., 418; *Sampson*, v. *Clark*, 2 Cush., 173; '*Kellogg* v. *Schyler*, 2 Denio, 73.)

"There are other authorities in which the same prin-'ciple is recognized—*Faxon* v. *Baxter*, 11 Cush., 35; '*Carrington* v. *Halibird*, 17 Conn., 580.

"It follows that the debt in question is not provable 'against the estate of the bankrupt, and no dividend 'can be allowed thereon."

In re Gallison, 2 Lowell Cir. C., 74, LOWELL, J.:

"The debtors maintain that S. Klous & Co. are not 'interested in the question of their discharge, because 'they have obtained a judgment since the proceedings 'were begun which will not be affected by the result. 'It has been one of the vexed questions of the law 'whether a discharge in bankruptcy or insolvency will 'operate on a judgment obtained after the date to which 'the discharge relates, but before it is actually issued, 'that is, pending the bankrupt proceedings.

"In Maine and Massachusetts it has been held that 'the judgment merges the original debt, and cannot be 'proved in the bankruptcy, and will not be affected by 'the certificate. (*Holbrook* v. *Foss*, 27 Me., 441; *Fisher* 'v. *Foss*, 30 Me., 459; *Pike* v. *McDonald*, 32 Me., 418; '*Sampson* v. *Clark*, 2 Cush., 173; *Woodbury* v. *Perkins*, '5 Cush., 86; *Faxon* v. *Baxter*, 11 Cush., 35; *Wolcott* v. '*Hodge*, 15 Gray, 547.)

"On the other hand, in New York and Vermont the 'decision has been that the judgment may be looked 'into, and if it is found that the debt was one that would 'be discharged, the judgment will be barred. (*Harring-'ton* v. *McNaughton*, 20 Vt., 293; *Downer* v. *Rowell*, 26 'Vt., 397; *Dresser* v. *Brooks*, 3 Barb., 429; *Fox* v. *Wood-'ruff*, 9 Barb., 498; *Church* v. *Rowling*, 3 N. Y., 216.)

"A similar difference of opinion has already appeared 'in connection with the act of eighteen hundred and 'sixty-seven. (*In re Williams*, 2 N. B. R., 79; *Bradford* 'v. *Rice*, 102 Mass., 472; *In re Brown*, 3 N. B. R., 145; '*In re Crawford*, 3 N. B. R., 171.)

"The argument for the side which the defendant as-'sumes in this case appears to me much the stronger. 'Not only the technical doctrine of merger is involved,

'but the defendant *has had his day in court, and one opportunity to plead this defense;* and I take it to be a rule 'of the highest importance that a defense which might 'have been made to the original cause of action can 'never be made to the judgment. Now, the bankrupt 'act provides most carefully for a stay of suit until the 'defendant's discharge is passed upon; giving, by fair 'implication, a power to the District Court even to enjoin 'action in the State Courts, contrary to the general prac-'tice. All this is for the very purpose of enabling the 'bankrupt to plead his discharge. If he does not choose 'to avail himself of this right, what possible ground is 'there for saying that the judgment shall not bind him?

"Are we to inquire in each case why his plea was not 'set up, or why it was overruled? It may be that the 'State Court was of opinion that the discharge, if granted, 'would be no bar. We cannot impeach their decision 'collaterally. *It may be that the bankrupt intended not to 'set up the discharge against this creditor.* We cannot 'authorize him to reconsider this determination; it may 'be that he was surprised. If there were any failure of 'justice in the particular case, the remedy must of course 'be found with the tribunals of the same jurisdiction. 'Until they have reversed or set aside the judgment, it 'operates as a new contract, and cannot be barred by a 'discharge which distinctly relates, as does this, to a 'date two years earlier.

"Coming to the decisions, we find that the two leading 'cases in New York both contain dissenting opinions of 'great ability, by Allen, J., in 3 Barb., 492, and Bronson, 'J., in 3 N.Y., 216, besides decisions and *dicta* of inferior 'courts of that State against the doctrine finally estab-'lished there.

"I consider these dissenting opinions well worthy of 'examination, and refer to them as able statements of 'what I consider the true doctrine; and they cannot but 'weaken the force of these authorities. But the con-'flict is really explained by the difference of practice in 'the several States. In Massachusetts the bankrupt 'could always obtain a continuance to enable him to 'plead his discharge, while in New York he could not. 'This difference is pointed out in *Haggerty* v. *Amory*, '7 Allen, 458, and is confirmed by the remarks of the

'learned judge who delivered the opinion of the court 'in 3 N. Y., 224, where, in commenting on a remark of 'the chancellor, at 11 Paige, 535, that the defendant 'ought to have pleaded his discharge at law, he says: ''And this may be conceded where the defendant has 'an opportunity for that purpose, which was not the 'case of the defendants in this suit.' In consideration 'of this concession, it may well be doubted whether 'the decision would have been the same under a law 'which gives the most ample 'opportunity for that 'purpose.'

"In truth, this is the source of the whole difficulty. 'It is seen to be unjust that a creditor should push his 'debt to judgment against a bankrupt who is using due 'diligence to obtain his discharge, and has surrendered 'all his property. It was accordingly enacted in Eng-'land, as early as seventeen hundred and thirty-two, that 'if a creditor did obtain such a judgment, and take the 'debtor on execution, he should be discharged on mo-'tion. (Stat. 5 George 2, ch. 30, sec. 13.) And this has 'been continued in force whenever the law has been 'revised.

"This is the foundation of all the English decisions, 'and they have given rise to an impression that in bank-'ruptcy a judgment obtained at such a time will be dis-'charged, and these decisions have had an undue weight 'in some of the decisions in this country." (See the arguments in *Dresser* v. *Brooks*, 3 Barb., 429.)

"The law *is* so in England, but it is the statute itself 'which provides for the case, and not any general rule 'in bankruptcy. It is easy to see by studying the English 'cases that this practice was established by statute to 'meet the very difficulty which our statute meets, by 'granting a stay of suits until the question of discharge 'is determined. Which of the two modes of meeting 'the difficulty is the better it is for the legislature to 'determine; but that they are essentially different, is 'plain.

"By section twenty-one an action may, by leave of 'the court in bankruptcy, proceed to judgment for 'the purpose of ascertaining the amount due, and that 'judgment may then be proved, but execution shall be 'stayed.

"This exception strengthens the argument for the 'general rule, because it implies that an ordinary judg-'ment, procured after the proceedings in bankruptcy 'are begun, cannot be proved in the bankruptcy. It is 'clearly the intent of the proviso that it should appear 'of record that the suit is prosecuted only for the par-'ticular purpose of establishing the amount of the debt, 'and that the court in which the suit is pending should 'modify its judgment as may be necessary to meet this 'state of facts, and should take care that no execution 'issue; and if the discharge should afterwards be granted, 'that court ought undoubtedly to vacate or discharge 'the judgment in some proper way, and I hold it to be 'the duty of the creditor to see that the record is rightly 'made up.' This provision is useless, if any ordinary 'judgment, not obtained by virtue of this proviso, can 'be proved in the bankruptcy, is to be binding on the 'parties, in the absence, of course, of any such fraud, 'error, or accident, as would require the court itself, 'or some appellate court, to vacate it. The objecting 'creditor here did not apply for leave to prosecute; did 'not record the fact that he intended to prove his judg-'ment; did not stay his execution; but took it out, and 'now holds and intends to enforce it. It was argued in 'his behalf that the superior court may yet set it aside. 'But he cannot be heard to set up this possibility, when 'he himself is still relying on the judgment which was 'obtained by his own act, and the validity of which he 'intends to maintain if he can."

"For the reasons given, and upon a careful examina-'tion of the decisions, I am of opinion that a judgment 'obtained after the adjudication in bankruptcy creates 'a new debt which cannot be proved in bankruptcy, 'because the judgment is a merger, and creates a new 'debt, and that the judgment creditor cannot oppose 'the discharge because he has no provable debt, and 'because the discharge will be no bar to the judgment."

Plaintiff in error opens his argument with several English cases which he claims lay the foundation for the rule upon which has arisen the American cases which he claims sustain him.

In *Clark* v. *Rowling*, 3 N. Y., 218, five out of eight of these same English cases were cited to the court, and before it in giving its opinion.

It is there said: "It appears from these answers that 'a suit at law was pending on the notes when the de-'fendants respectively presented their petition in bank-'ruptcy, and that their certificates of discharge were 'granted, the one in about two, and the other in about 'three months after the judgment was perfected. *There 'was no opportunity for them to plead their discharge 'during the pendency of the suit at law*, and the question 'now presented is, whether in answer to this *bill*, which 'is a species of equitable suit *upon* the judgment, the 'defendants can set up their discharge with the same 'effect as in an action on the notes upon which the 'judgment was founded, it not being denied that the 'discharge operated upon the debt which was secured 'by the notes—the same being provable under the pro-'ceedings in bankruptcy—but the plaintiff contending 'that the notes were merged in the judgment; that the 'latter is a new debt which did not exist at the time 'the bankrupts petitioned, and that therefore it ought 'not to be affected by their discharge.

"It is true that the notes, as evidence of an indebted-'ness, were merged in the judgment, which being 'greater security, operated to extinguish the lesser; but 'does it therefore follow that the judgment to all 'intents became a new debt, and that the merger or 'extinguishment of the notes was so complete as that, 'for the purpose of protecting the defendants in an 'equity connected with their original indebtedness, we 'may not look behind the judgment and see upon what 'it was founded? A judgment, instead of being re-'garded strictly as a new debt, is sometimes held to be 'merely the old debt in a new form, so as to prevent a 'technical merger from working injustice. And this 'exception to the doctrine contended for by the plaintiff 'has obtained, especially in cases of insolvency and 'bankruptcy, for the protection as well of the creditor 'as the debtor, and has been applied impartially for the 'benefit of both. An example in favor of the creditor 'is found in the case of *Wyman* v. *Mitchell*, 1 Cowen's 'Rep., 316."

"This was an action of debt on a judgment of the 'Supreme Court of this State of August Term, 1816; the 'plea was, that the defendant, on the 30th day of De- 'cember, 1817, was discharged under the insolvent act 'of this State of 1813, to which there was a replication 'that the judgment declared on was rendered on a judg- 'ment obtained in the year 1814, in the Court of Com- 'mon Pleas of Cumberland, in the State of Maine, which 'last judgment was rendered upon certain notes made 'by the defendant to the plaintiff, in the State of Maine, 'prior to the New York insolvent act of 1813. And 'the court held that, although the original undertaking 'of the defendant was so merged in the judgment, that 'no suit could be maintained upon it, yet that it was 'proper to inquire into the time and circumstances of the 'contract upon which the first judgment was founded, 'for the purpose of taking the case out of the operation 'of the defendant's discharge. (*See also Raymond* v. '*Merchant*, 3 Cowen's Rep., 147.) An example of a 'similar kind, but in favor of the debtor, may be found 'in the case of *Betts* v. *Bagley*, 12 Pick. Rep., 572, which 'was an action of debt on a judgment recovered in 'October, 1823, in the Court of Common Pleas of Berk- 'shire county, in the State of Massachusetts. The de- 'fendant pleaded with proper averments a discharge 'under the insolvent laws of the State of New York of '1813, which was granted on the 17th day of May, 1828, 'but which could not have operated upon a judgment 'in the State of Massachusetts, unless the court had 'inquired into the circumstances of the case and the 'nature of the debt upon which the judgment was 'founded. Upon such inquiry, it appeared that when the 'suit was commenced in the Common Pleas of Berk- 'shire, and the original judgment was rendered, both 'parties were citizens of this State, and that the judg- 'ment was upon promises made and to be executed here; 'and under these circumstances the court gave effect to 'the defendant's discharge, refusing to carry the tech- 'nical doctrine of merger to such extent as to defeat 'the equities of the defendant arising from the nature 'and circumstances of the original debt.

"*We have been referred to cases of bankruptcy in Eng- 'land where the judgment was obtained before the certi-*

'*ficate on a debt which existed previous to the bankruptcy;* '*so that the defendant had* NO *opportunity to plead his dis-* '*charge, and where the courts have given* EFFECT *to the* '*discharge on motion. But, as this practice was expressly* '*enjoined by the thirteenth section of the statute of 5 Geo.* '*2, c. 30, entitled an* '*Act to prevent the committing of* '*frauds by* '*bankrupts,*' and *other bankrupt acts*, many 'of the cases cited do *not come with the same authority* as 'if they had been determined in administering the *com-* '*mon-law powers* of the British courts.' "

And it is remarkable that the very case here relied on by Boynton *refuses* to allow the authority in this country of all these English cases.

It will thus be seen that the whole drift of the opinion in this case of *Clark* v. *Rowling* was because, where judgment was rendered pending bankruptcy and before discharge, the bankrupt could not plead his discharge, upon this *equity* of the bankrupt, to so modify the doctrine of merger as to relieve him against such judgment; and it was put wholly on the ground that he had had *no* opportunity to plead his discharge.

But, as was said by Judge LOWELL *in re Gallison*, *supra*, the dissenting opinion in this case by Justice BRONSON, concurred in by JEWETT, J., is one of great ability, and is an able statement of the true doctrine, to wit—that there *is* such a merger by judgment pending bankruptcy that such new judgment is not discharged; and we submit that this able dissenting opinion by two New York judges is more than a set-off to the single dissenting judge in the Dakota case.

No execution having been issued on the original money decree, it became *dormant*—"outlawed," as plaintiff in error is pleased to phrase it.

Now, there are *two* modes of proceeding upon a dormant or "outlawed" judgment—one by reviving it by *scire facias*, the other by simply using it as a cause of action, suing upon it. By the first the original judgment is simply continued along in force among other incidents, carrying its legal rate of interest; by the latter the amount of principal and interest becomes the face

of the new judgment upon which the statute now gives interest; the consequence of which is that in this respect, also, the *new* judgment has a very different effect from a mere revival by *scire facias;* the interest alone in this case amounted at the date of the last judgment to $5,234.99, and was added to the debt of $6,223.99, and the *new* judgment carries interest on both these sums, whereas a revival by *scire facias* would have deprived us of interest on the first, a difference in interest annually of over $300.

Ball brought an action of debt on his decree; he did not, as claimed by plaintiff, *revive* it by *scire facias.*

A glance at the authorities cited by appellant, to the point that the recovering a new judgment upon an old one does not merge the old judgment, none of which authorities are later than a half century ago, and most of which are in black letter, impresses us with the idea that at least a more diligent, if not a more willing, search among later authorities would not have warranted counsel in making so broad a claim.

In *Gould* v. *Hayden*, 63 Ind., 448, it is said:

"Was the judgment first rendered in the Court of 'Common Pleas of Union county, in this State (Indiana), 'in favor of said Louis Stix & Co., and against said 'Louisa J. Johnson, so merged and absorbed in the 'judgment afterward rendered thereon in the Court of 'Common Pleas of Warren county, in the State of Ohio, 'as to destroy the lien, vitality, and other qualities of 'the first-named judgment?

"It seems very clear to us that this question must be 'answered in the affirmative. A judgment is a 'debt 'of record;' and, whether foreign or domestic, an 'action may be maintained thereon for the recovery of 'such debt, even where it might appear that the judg-'ment plaintiff could enforce the collection of his 'judgment by an execution issued out of the court in 'which it was rendered. (*Davidson* v. *Nebaker*, 21 'Ind., 334.) The judgment plaintiff, of course, controls 'his judgment.

"He may enforce its collection by the process of the 'court in which he obtained his judgment, or he may,

'if he may elect so to do, use his judgment as an original cause of action, and bring suit thereon in the same or some other court of competent jurisdiction, and prosecute such suit to final judgment. This procedure he may pursue as often as he elects, using the judgment last obtained as a cause of action on which to obtain the next succeeding judgment; but the very freedom with which this may be done, *ad infinitum*—and we know of no law or legal principle which would prevent its unending repetition—is, to our minds, a convincing and conclusive reason why each successive personal judgment ought to and must be regarded as a complete merger and extinguishment of the preceding judgment, with all its qualities and incidents. Each successive personal judgment is a new 'debt of record' in which the precedent debt, though theretofore evidenced by a judgment, is as completely merged and absorbed as it would have been if it had been evidenced by note, bill, bond, or any other evidence of debt. If the precedent judgment is merged, as we think it must be, in the succeeding judgment, then it follows of necessity, as it seems to us, that the former judgment is completely extinguished. It has ceased to exist for any purpose; it cannot be used again as the foundation of another action, and all its qualities and incidents are lost and swallowed up in the judgment obtained thereon. This is so without regard to the 'dignity' of the courts in which the respective judgments may have been rendered. The modern, and we think the better, doctrine on the subject under consideration is thus stated in Freeman on Judgments, Sec. 215:

"'The new judgment, though inferior as an instrument of evidence to the old one, and not attended by the same liberal, jurisdictional presumptions, ought, nevertheless, to entirely supplant the old one, because it is the most recent judicial determination of the rights of the parties, and because the plaintiff has voluntarily elected to abandon his former judgment to secure one which, though in an inferior court, is conclusive in favor of the continuance and amount of his claim.'

"In section 216 of the same excellent treatise, it is further said:

"'The weight of authority in the United States 'shows that whatever may be a cause of action will, if 'recovered upon, merge into the judgment or decree. 'A contract by specialty merges into a judgment in the 'same manner as a simple contract. A judgment is 'extinguished when, being used as a cause of action, it 'grows into another judgment.'

"It is further said in section 388 of the same treatise 'that 'the merger occasioned by one judgment being 'recovered upon another, as it extinguishes the judg-'ment sued upon as a cause of action also, destroys its 'effect as a lien.'

"In support of the conclusion we have reached in 'the case at bar, the appellees' counsel have referred 'us, in their able and exhaustive brief, to the following 'authorities, which we have found, upon examination, 'to be fairly in point, and therefore cite them: *Purdy* 'v. *Doyle*, 1 Paige, 558, 561; *Denegre* v. *Haun*, 13 Iowa, '240; *Whiting* v. *Beebe*, 7 Eng., 421, 549; *Chitty* v. '*Glenn*, 3 Mon., 425; *Frazier* v. *McQueen*, 20 Ark., 68; '*Neale* v. *Jeter*, 20 Ark., 98; *Bank of the U. S.* v. *Patton*, '5 How., (Miss.,) 200; and *Brown* v. *Clarke*, 4 How., '(U. S.,) 4."

"We are aware that there are respectable authorities 'which are in conflict with our conclusion in this case, 'but it has seemed to us, after a careful consideration 'of the main question involved, that our decision 'thereof is in harmony with and supported by the 'weight of modern authority; that it is just and right 'in principle, and that, as a rule of law, it will best 'subserve and protect the rights of all parties."

"The appellant's counsel have laid great stress in 'their argument upon the case of *Stockwell* v. *Walker*, '3 Ind., 215; but the point in judgment in that case is 'not in conflict with our decision of this case. In the 'case cited a judgment had been revived upon a *scire* '*facias*, and the real question for decision was whether 'or not the original judgment was merged in the judg-'ment of revivor; and the court, very properly, we think, 'decided that it was not so merged. The judgment of 'revivor simply revived or gave vitality to the original 'judgment. The judgment of revivor did not become 'a new debt of record, but merely revived the old debt

'of record. This latter doctrine was recognized and 'approved by this court in the more recent case of 'Armstrong v. McLaughlin, 49 Ind., 370, but, in this 'latter case, it is apparent, we think, from the language 'of the opinion, that if the record had shown that a new 'judgment had been rendered on the old judgment, as 'a cause of action, the court would then have held that 'the old was merged in the new judgment."

On this precise question the Supreme Court of Georgia say, in construing this section 5106:

"Such suit or proceeding shall be stayed upon the 'application of the bankrupt. It will thus be seen that 'the bankrupt must make application in some way to 'have the proceedings stayed in the State Court. This 'he did not do; and as his own *laches* has allowed this 'judgment of a court of competent jurisdiction to be 'rendered against him, we hold that the judgment is 'good, and that his discharge, being subsequent thereto, 'does not relieve him from its operation."

Steadman v. *Lee*, 61 Georgia, 59.

"The adjudication of bankruptcy does not divest a 'State Court of its jurisdiction in a pending cause. In 'many cases it is the *duty* of the State Court to pro-'ceed to final judgment; in other cases it is the duty of 'the court on application of the bankrupt or his assignee 'to stay proceedings until the question of discharge is 'determined."

Evarts v. *Hyde*, 51 Vermont, 102.

GRAY, C. J., of Mass.:

"The Bankrupt Act (of 1867) peremptorily requires 'that any suit upon a claim provable in bankruptcy 'shall, upon the application of the bankrupt, be stayed 'to await the determination of the Court in Bankruptcy 'upon the question of his discharge, unless there is 'unreasonable delay on part of the bankrupt in endeav-'oring to obtain his discharge, or leave is granted by 'the Court in Bankruptcy to prosecute the suit to judg-'ment to ascertain the amount due. The object of this 'enactment is to protect the bankrupt from being 'harassed by suits before the question of his discharge

'is determined, as well as to enable the assignee to 'come in, if he chooses, and assume the defense of the 'suit.' If either the bankrupt or his assignee seasonably 'avails himself of this privilege, it is not in the discre- 'tion of the State Courts to disobey the act of Congress 'and defeat its object, by compelling the defendant to 'proceed to trial."

Hersey v. *Jones*, 128 Mass., 472.

Miller v. *Clements*, 54 Texas Rep., 351.—Suit by petition for injunction to restrain collection of a judgment, alleging that pending a suit in the District Court of Gonzales county by defendant in error, against his former guardian upon his bond, the plaintiff in error (who was one of his sureties) was duly declared a bankrupt, and proceedings were stayed in the case for several years. That afterwards the bankrupt made no further appearance in the case, and that, finally, judgment was recovered against him for the sum of $174.86 on the 10th of November, 1870. It is alleged that the plaintiff had notice of the proceedings in bankruptcy; that the complainant knew nothing of the rendition of judgment against him until 1874, and that he was unrepresented in court. It is shown by the bill that the discharge was never pleaded, and the court had no notice that the said complainant had ever been discharged in bankruptcy, nor is it alleged that the claim was ever proven up against the bankrupt estate in open court.

"The court *held* that the judgment was not a nullity 'by reason of anything he has alleged. The suit against 'him was instituted in 1865. It remained pending, 'and was continued from term to term until matured 'into a judgment. He avers that he obtained a dis- 'charge in bankruptcy in 1868; that the plaintiff had 'legal notice of that suit; that by the provisions of the 'general bankrupt law all proceedings in the District 'Court of Gonzales county against him were stayed; 'that the court had no jurisdiction to proceed further in 'the case; that he had no notice, nor was he represented 'in court after his adjudication in bankruptcy, and no 'knowledge of any judgment against him until Septem- 'ber 22, 1874; but he does not aver that the continuance 'of the case was had because of any suggestion of his

'bankruptcy or application therefor by him, nor that 'he had pleaded his discharge in that suit.

"A State Court will take no notice of proceedings in 'bankruptcy in a Federal Court unless it is properly 'presented in a way it can be judicially acted on. (49 'Texas, 16; 42 Texas, 1.)

"Nor does the State Court lose its jurisdiction of the 'person of the defendant by his being adjudicated a 'bankrupt. (42 Texas, 1.)

"The defendant there continued in court a party to 'the suit against him. It was his duty, if he intended 'to avail himself of his discharge, to plead it; not having 'done so, and no fraud being practiced upon him to 'prevent him from doing so, he cannot set up his neg-'ligence or ignorance of the law to set aside a judgment 'which, by his own default, he has suffered to be ren-'dered against him. Neither in law nor equity has he 'any claim to be released from the consequences of his 'own laches."

In re Mansfield, 6 Bankruptcy Register, 393.—The United States, in a suit pending against Mansfield, who had been adjudicated bankrupt, instead of proving their debt, elected to pursue their suit on the bond. It was there held that—

"When a creditor obtains from his debtor a security 'of a higher nature than he had before, the original 'debt is merged in the higher security, and can no 'longer be made the foundation of any action or suit, 'or of proof in bankruptcy or insolvency."

Lindley on Partnership, 368, 10 C. B. Rep., 561.
Wells v. *Leroy*, 3 McM. & G. Rep., 378.

"This doctrine has been repeatedly held in Louisiana. 'In *Oakey* v. *Murphy*, 18 An., 372, the court said:

"'In this case, which is an action by the holder of a 'promissory note against the maker, the plaintiff filed 'a supplemental petition in which he alleged that a 'judgment had been rendered in his favor at the time 'of the institution of his suit, on the note sued on in 'the Circuit Court of the United States for the Southern 'District of Mississippi. On a judgment by default being 'taken, it was confirmed on the evidence of this judg-

'ment rendered in Mississippi. So far from this 'judgment proving the right of the party to recover on 'the note, it establishes the reverse, inasmuch as it is 'a merger of the note. The plaintiff has lost his right 'of action on the note, and he has no right to amend 'his petition by an allegation which extinguishes it.' 'The court refers to 9 L. R., 417; 2 M., N. S., 599; 'and 3 Blackstone; see, also, 7 An., 334; 12 An., 738.

"*In re R. Williams*, 2 N. B. R., 79, the learned judge 'for the district of Connecticut held 'that a debt upon 'which a judgment of law is founded is merged in the 'judgment and extinguished by it,' citing 27 Maine, '441; 32 Maine, 418; 2 Cush., 173; 2 Denio, 72; 17 and '11 Cush., 25; 17 Conn., 580. The authorities cited 'sustain the learned judge in the conclusion to which 'he arrives. See, also, 6 Hill, 255, where the court 'says: 'The defendant has been discharged under the 'bankrupt law from all debts which he owed at the 'time he presented his petition. Subsequent to that 'time the cognovit was given, and the judgment re-'covered. The original debt has been merged and 'extinguished by the judgment. The judgment is a 'new debt, which is not affected by the discharge.' 'BACON says: 'If a bond creditor obtains a judgment 'on the bond, or has judgment acknowledged to him, 'he cannot afterward bring an action on the bond, for 'the debt is drowned in the judgment, which is a 'security of higher nature than the bond.' (Extinguish-'ment (D), citing 6 Coke, 40.)

"The authority cited is *Higgins'* case, wherein Lord COKE says:

"'It was objected that if a man recovers debt on a 'bond or rent on a lease for years, it is at the plaintiff's 'election to sue execution on that judgment or to have 'a new action.'

"But it was resolved 'that, so long as the judgment 'remains in force, he cannot have a new action on the 'same bond, for, as he who has a debt by simple con-'tract, and takes a bond for the same, or any part of it, 'the contract is determined, so, when a man has a debt 'on a bond, and by ordinary course of law has judg-'ment thereon, the contract, by specialty, which is of 'an inferior nature, is by judgment of law changed

'into a matter of record, which is of a higher nature.'

"The latest authority of the highest court of our 'country is to be found in 6 Wall., 234, in the case of '*Mason* v. *Eldred et al.*, FIELD, J., the organ of the 'court there says:

"'If the note in suit was merged in the judgment, 'then the judgment is a bar to the action, and an 'exemplification of its record is admissible, for it has 'long been established that, under the plea of the gen-'eral issue in assumpsit, evidence may be received to 'show, not merely that the alleged cause of action never 'existed, but also to show that it did not subsist at the 'commencement of the suit.'

"And again, at page 238:

"'The general doctrine maintained in England and 'the United States may be briefly stated: A judgment 'against one upon a joint contract of several persons 'bars an action against the other, though the latter were 'dormant partners of the defendant in the original 'action, and this fact was unknown to the plaintiff 'when that action was commenced. When the contract 'is joint, and not joint and several, the original cause 'of action is merged in the judgment. The joint lia-'bility of those not sued with those against whom judg-'ment is recovered being extinguished, their entire 'liability is gone.

"'Indeed, the whole opinion there reported is an able 'review of the decisions of the State and the United 'States Courts upon this most interesting question or 'doctrine of the law. Counsel for the petitioner Coch-'rane has cited in his brief opinions adverse to the 'conclusion at which I have arrived. (Opinions to be 'found in 3 N. B. R., 145, 171.)

"But however great may be my respect for my 'brothers of the Eastern and Western Districts of Mich-'igan, and of the Southern District of New York, I 'cannot readily yield a doctrine which is supported by 'a long line of decisions, commencing with the year 'books cited by Lord Coke, and coming down to this 'day. When, therefore, on the eighth day of June, 'eighteen hundred and seventy, the United States 'elected to take judgment upon the bond, they parted

'with all right to prove the bond as a debt due and 'payable from the bankrupt at the time of the adjudi- 'cation of bankruptcy, and as a debt to be proved against 'the estate of the bankrupt.' "

In *Bradford* v. *Rice*, 102 Mass., 473, opinion by GRAY, C. J., it was said:

"The ruling of the court below was in accordance 'with a series of decisions of this court by which it has 'been held that if, after the institution of proceedings 'in insolvency or bankruptcy, judgment is recovered 'upon a debt provable under those proceedings, the 'original debt is merged and extinguished in the 'judgment, and the judgment is not provable against 'the estate of the debtor, nor discharged by the certifi- 'cate; and this not merely because such a merger takes 'effect by the rules of the common law, but because 'the creditor, by taking judgment, and so changing 'the form of his debt, and securing to himself the 'benefit of conclusive and permanent evidence of it, 'and an extension of the period of limitation of an 'action thereon, is held, on his part, to have elected to 'look to the debtor personally, and to abandon the right 'to prove against his estate; and the debtor, on the 'other hand, who might have protected himself by 'moving the court in which the action was pending for 'a continuance, in order to afford him an opportunity to 'obtain and plead a certificate of discharge, is held, by 'omitting to make such a motion before judgment, to 'have waived the right to set up his certificate against 'the plaintiff's claim; and therefore the rights of both 'parties must be governed by the judgment which the 'one has moved for and the other has suffered to be 'rendered. (*Sumpson* v. *Clark*, 2 Cush., 173; *Wood- 'bury* v. *Perkins*, 5 Cush., 86; *Wolcott* v. *Hodge*, 15 'Gray, 547.)

"This rule was established when the continuance of 'the action, in order to enable the debtor to plead his 'certificate, depended only upon the practice of the 'court. There is even stronger reason for adhering to 'it under the present bankrupt act of the United States, 'which contains an express provision that 'no creditor,

'whose debt is provable under this act, shall be allowed to prosecute to final judgment any suit at law or in equity therefor against the bankrupt until the question of the debtor's discharge shall have been determined; and any such suit or proceedings shall, upon the application of the bankrupt, be stayed to await the determination of the Court in Bankruptcy on the question of the discharge,' except in two cases: the one of unreasonable delay on the part of the bankrupt in endeavoring to obtain his certificate, the other of the plaintiffs proceeding to judgment, by special leave of court, for the single purpose of ascertaining the amount due, which may be proved in bankruptcy; in which last case no execution is to issue on the judgment. (U. S. St. 1867, c. 176, § 21.) Both of these exceptions accord with the practice of the courts of this State in cases arising under the insolvent law. (*Barker* v. *Haskell*, 9 Cush., 218, 222.) And the last of them is analogous to one which has long existed in our statutes concerning the settlement of insolvent estates of deceased persons. (St. 1784, c. 2; *Blossom* v. *Goodwin*, 1 Mass., 502; *Hunt* v. *Whitney*, 4 Mass., 620; Rev. Sts., c. 68, § 19; and Commissioner's Note, Gen. Sts., chap. 99, § 20.)

"In accordance with the decisions of this court, it has been held by Judge SHIPMAN, in the District Court of the United States for the district of Connecticut, that a creditor, by taking a judgment in common form after the commencement of bankruptcy proceedings, loses the right to prove in bankruptcy. (*In re Williams*, 2 Bankr. Reg., 79.) And we have been referred to no opposing decision of the Federal Courts.

"*Haggerty* v. *Amory*, 7 Allen, 458, cited for the defendant, was an action upon a judgment recovered in the courts of New York after the commencement of proceedings in bankruptcy under the bankrupt act of 1841, which contained no such provision as that of the present bankrupt law above quoted; and the defendant was allowed to plead his certificate only because it appeared by the decisions of the New York courts that they did not in practice delay proceedings to allow the defendant to plead it, and therefore consistently held a judgment upon the original debt not to cut off his right to plead it at all.

"At the trial of the present case no evidence was 'offered that the practice or the decisions in New 'Hampshire upon this matter differed from our own; 'and the latest case in the highest court of that State, 'which was cited at the argument, shows that they are 'in harmony with ours. (*Hollister* v. *Abbott*, 11 Foster, '442.)

But if we were wholly without the light, reason, and authority of all the preceding cases, it is submitted that the question of whether Boynton has not, on the facts of this case, been guilty of such gross negligence in not applying for a stay of proceedings as should deny him, after this long lapse of time, the relief sought, cannot be, and is not, an open question in Illinois.

In the case of *Holden* v. *Sherwood*, 94 Ill., 92, after verdict, the defendant suggested that he had been adjudicated bankrupt, and on leave filed a transcript of the proceedings in bankruptcy, but judgment was entered on the verdict, whereupon the case came to this court on appeal.

WALKER, J., delivering the opinion of the court, says:

"It is urged that the general bankrupt act (Rev. 'Stat. U. S., Sec. 5106) prohibits all creditors from '' prosecuting their suits to final judgment against a 'bankrupt until the question of the discharge of such 'debtor shall have been determined; and any such suit 'shall be stayed to await the determination of the court 'in bankruptcy on the question of discharge,' etc."

"The record contains no bill of exceptions, and it only 'states that appellant suggested his bankruptcy to the 'court and asked leave to file the transcript of the record 'showing his bankruptcy. It nowhere appears that 'any motion was entered for a stay of proceedings until 'the question of his discharge should be determined."

"Before a justice of the peace a motion, accompanied 'with the transcript and based thereon, would be proper 'practice, as it is not a court of record, and pleadings 'are not required."

"When based on the transcript alone, there must be 'a motion for an order to stay proceedings. This is

'the only means by which the court can have anything 'upon which to act."

"A court would not be authorized to enter such an 'order of its own motion, nor is it the duty of the judge 'to make inquiry to learn whether the parties, or either 'of them, have become bankrupt, nor can he act on any 'knowledge he may acquire until asked in an appro- 'priate manner."

"It is true the statute prohibits the court from pro- 'ceeding to final judgment until the question of a dis- 'charge shall be determined, but the fact must be 'pleaded or brought to the knowledge of the court in 'a proper manner. As well say, that if a defendant 'were to suggest that he had paid the debt for which 'he was sued, and ask leave to and file the receipt, it 'should prevent the court from proceeding to try the 'case. A bankrupt may waive a discharge. The law 'does not compel him to rely on it, nor does it require 'a court to allow the discharge simply upon the fact 'being suggested. To defeat the action, it must be 'pleaded in the same manner as any other defense."

"The suggestion that the defendant was a bankrupt 'was wholly unlike the suggestion of the death of one 'of the parties, as in that case the court thereby loses 'jurisdiction of the party by his death, and the court 'can proceed no farther until some person is substituted 'to represent him. Not so with the bankrupt, as the 'court still continues to have jurisdiction of his person, 'and may proceed to trial and judgment unless he, in 'a proper manner, interposes his bankruptcy."

"But even if there had been a proper motion, it came 'too late, as the bankruptcy had occurred some five 'months before the trial, if we may look into the cer- 'tificate of the register."

"Appellant should have made his motion for a stay 'of proceedings, based on the transcript, before the 'cause was called for trial. He could not be permitted 'to lie by and permit the plaintiff to incur the expense 'of a trial, and when it terminated in a verdict against 'him, then, for the first time, to ask for a stay of pro- 'ceedings."

Dormire v. *Cogly*, 7 Blackf., 177, was decided under the Act of 1841. The plaintiffs in error in the Supreme

Court of Indiana had, in the court below, moved to set aside a *fieri facias*, which at the suit of Cogly, on a judgment in his favor in 1841, had issued against them. Their motion was denied; whereupon they took the case up by writ of error.

In the Supreme Court a plea in bar of the writ was interposed, that on 25th May, 1842, Dormire, one of the plaintiffs in error, had filed his petition in bankruptcy, was adjudicated bankrupt, and on 21st November, 1842, was discharged.

On demurrer to this plea the court said:

"We think the plea is bad for this reason, if for no 'other, that the judgment removed by writ of error was 'rendered *after* Dormire was declared bankrupt."

McCarthy v. *Goodwin*, 8 Mo. Appeal, 381. HAYDEN, J., delivered the opinion of the court:

"The question involved is as to the effect of the 'judgment obtained in a State Court against a bank-'rupt, pending bankrupt proceedings, but before dis-'charge, upon a debt provable against the estate, and 'contracted prior to the adjudication in bankruptcy. 'This suit, on an open account, was brought on the '21st day of May, 1877. In October, 1877, the plaintiffs 'took default for failure to answer, and on November '30th, 1877, final judgment, no suggestion of bank-'ruptcy having been made. On September 22d, 1877, 'the defendants were adjudicated bankrupts, and on 'April 27th, 1878, obtained their discharge. On Octo-'ber 12th, 1877, the plaintiffs proved their claims in 'bankruptcy, and afterwards, and before execution was 'issued, collected a dividend, for which they gave credit 'on the execution issued in this case. The defendants 'filed their motion to quash the execution, claiming 'that the discharge in bankruptcy discharged the judg-'ment, and now appeal from the order overruling their 'motion."

"The conclusions reached by this court in the case 'of *Haber* v. *Klauberg*, 3 Mo. App., 342, go far to decide 'the case. We are satisfied that the conclusions there 'reached are correct, and the grounds on which they

'rest need not be again discussed. That case is in 'harmony with the decision of the Supreme Court of 'this State in *Bank of Missouri* v. *Franciscus*, 15 Mo., '308, where the court holds that the facts in regard to 'the bankrupt proceedings are like any other facts, and 'must be pleaded. Though there are decisions which 'countenance the opposite view, they cannot be de-'fended upon principle; and if carried to their logical 'result, their doctrine seems only to lead to absurdities. 'In the case at the bar the defendant had full oppor-'tunity to suggest the pendency of the proceedings in 'bankruptcy, and to make such a showing as would 'have secured the necessary delay. Yet, virtually, he 'refused to do this. Why should he be treated in a 'different manner from any defendant who fails to bring 'to the notice of the court, pending proceedings, any 'matter which may be a possible ground of defense? 'It is said that it is impossible for a bankrupt to plead 'his discharge before he has obtained it. This avoids, 'but does not meet, the question. The pendency of the 'proceedings can always be suggested; and if this plea 'is disallowed as ground for delay, and discharge is 'afterward obtained, redress will then be obtained for 'the defendant.

"The New York decisions upon which the defendant 'relies have *not* commanded general assent. (*Clark* v. '*Rowling*, 3 N. Y., 216 (Bronson, C. J., and Jewett, J., 'dissenting); *Dresser* v. *Brooks*, 3 Barb., 429.) The dif-'ference between the New York and the Massachusetts 'decisions is said to rest upon the fact that in Massachu-'setts the bankrupt could always obtain a continuance 'to enable him to plead his discharge, while in New 'York he could not. (*Haggerty* v. *Armory*, 7 Allen, '458; *In re Gallison*, 5 Nat. Bank Reg., 353.) We are 'satisfied that the correct doctrine is that, under the cir-'cumstances stated, the judgment is valid, and is not 'discharged by the discharge of the debtor in bank-'ruptcy. (U. S. Stats., 1867, chap. 176, sec. 21; *Cutter* 'v. *Evans*, 115 Mass., 27; *Palmer* v. *Merrill*, 57 Me., 28; '*Fisher* v. *Foss*, 30 Me., 459; see *Doe* v. *Childress*, 21 'Wall., 643; *Eyster* v. *Gaff*, 91 U. S., 521.)

"The judgment is affirmed."

Wise's Appeal, 99 Penn., S., 193, TRUNKER, J.:

"No creditor whose debt is provable shall be allowed 'to prosecute to final judgment any suit at law or in 'equity therefor against the bankrupt until the ques- 'tion of the debtor's discharge shall have been deter- 'mined, and such suit shall be stayed upon applications 'of the bankrupt, to await the determination of the 'court in bankruptcy on the question of discharge; but 'if the amount be in dispute by leave of said court, the 'suit may proceed to judgment for the purpose of ascer- 'taining the amount due, and execution shall be stayed. '(R. S., sec. 5106.) A discharge from bankruptcy, sub- 'ject to certain exceptions named in the statute, shall 'release the bankrupt from all debts, claims, liabilities, 'and demands which were or might have been proved 'against his estate in bankruptcy. (*Id.*, sec. 5119.)"

"In an action upon judgment, which was obtained 'against a defendant, after he was adjudicated a bankrupt, 'and before his discharge, upon a debt provable under 'the bankrupt laws, the original debt is merged, and the 'certificate of discharge granted subsequently is no de- 'fense. (*Bradford* v. *Rice*, 102 Mass., 472.) The original 'debt is merged in and extinguished by the judgment, 'and the judgment is a new debt which is not affected 'by the discharge. (*Thompson* v. *Hewitt*, 6 Hill, 255.) 'In New York the practice has been to permit one cast 'in judgment to avail himself of a bankrupt or insolvent 'discharge by motion and order for a perpetual stay of 'execution thereon. This is allowed in case where he 'had no opportunity to plead his discharge. If fraud 'be alleged as ground for impeaching the discharge, 'the court would open the case so that the question 'could be tried. Where a trial had determined the 'amount due before the petition was filed and the de- 'fendant adjudicated a bankrupt and the judgment after 'the commencement of the proceedings in bankruptcy, 'it was held that a stay of proceedings would not have 'availed to enable the defendant to plead his discharge, 'and he was entitled to an order for perpetual stay of 'execution. (*Monroe* v. *Upton*, 50 N. Y., 593.)"

"In a procedure in bankruptcy, on July 17, 1879, 'Wise was discharged of and from all debts and claims 'provable under the bankrupt laws of the United States,

'and which existed on December 31, 1875, on which 'day the petition for adjudication was filed by his cred- 'itors, excepting such debts, if any, as are by said laws 'excepted from the operation of a discharge in bank- 'ruptcy. On January 21, 1876, judgment was entered, 'by confession, against Wise and Brown, on a note 'dated October 27, 1875, by virtue of a warrant of attor- 'ney embodied in said note. The first knowledge Wise 'had of this entry of this judgment was when the writ 'of *scire facias* for its revival was served on him January '17th, 1881, and he applied for the rule to open the 'judgment at the term to which said writ was return- 'able."

"Judgments confessed by virtue of warrants of attor- 'ney, whether entered in term or vacation, or without 'the actual knowledge of the court, and without notice to 'the defendant. While such a judgment stands, there is 'no difference in legal effect between it and a judgment 'on the verdict of a jury; but the court in which the judg- 'ment is confessed will open it and let the defendant 'into a defense upon his showing cause. (*Hopkins* v. '*West*, 2 Nor., 109.) In the trial of a *scire facias* on a 'judgment no inquiry into the merits of the original 'judgment can be had, and the only defense is some 'matter arising since the judgment. (*Doseling* v. *Mc-* 'Gregor, 10 Nor., 410.) The original judgment is as 'conclusive in a *scire facias* to revive as in the action of 'debt upon it. In Pennsylvania it is the right of a de- 'fendant in a judgment confessed against him by virtue 'of a warrant of an attorney to have it opened when 'he promptly applies and shows a legal or equitable de- 'fense which existed at and before the time it was en- 'tered. He need not resort to a court of equity for 'injunction against its collection. The appeal to open 'the judgments to the equitable powers of the court, 'and the court, in the exercise of a sound discretion, 'grants or refuses the prayer as a chancellor would. '(*Kneedler's Appeal*, 11 Nor., 428.)

"This judgment ought to be opened, that a trial may 'be had upon the merits. It was entered after the com- 'mencement of the proceedings in bankruptcy against 'Wise, and before he obtained his discharge. *He had* '*no opportunity to ask stay of proceedings* until the ques-

'tion of his discharge should be determined. He ap-'plied for relief directly after he received notice or 'knowledge of the judgment, and *laches* cannot be justly 'imputed to him. He cannot plead the discharge in bar 'to the *scire facias*, but may to the original debt if the 'judgment be opened."

Brown v. *Morange*, 108 Penn. S., 69, was a case where a bond having been given in 1871, the obligor filed his petition in voluntary bankruptcy in 1875, and in 1876 confessed judgment on the bond, and afterwards, in 1878, was discharged in bankruptcy.

In a suit afterwards brought to revive the judgment it was offered to be shown on the part of the defendant that he was induced to confess the judgment upon the plaintiff's oral representation that if he did ultimately obtain a discharge the judgment should be satisfied by his discharge, and that in pursuance of such understanding the judgment was entered, but nothing as to the understanding was expressed or preserved upon the record of the proceedings.

The defendant requested the court to charge the following point: That the certificate of discharge issued under the seal of the bankrupt court 12th June, 1878, to James Brown, the defendant, discharges the judgment upon which this *scire facias* was issued; the original judgment having been obtained on a bond dated 25 April, 1875, and the said plaintiff being a creditor embraced in defendant's schedule of creditors in bankruptcy, the plaintiff is not entitled to recover. The trial court rejected the testimony and refused the point; and on appeal the court of last resort of Pennsylvania, while holding the rejection of the testimony offered to the error, decide as follows:

"In refusing to charge as requested in defendant's 'point the learned judge followed the ruling of this 'court in *Wise's Appeal*, 3 Out., (99 Penn. S.,) 193, in 'which it was held that in an action on a judgment 'obtained after the defendant therein was adjudicated a 'bankrupt and before his discharge upon a debt prov-'able under the bankrupt law, the original debt is 'merged in the judgment, and the subsequently-granted

'certificate of discharge is no defense thereto. The 'judgment on which the *scire facias* issued possesses 'all those distinctive features. It was confessed by 'defendant, after his adjudication and before his dis-'charge as a bankrupt, for a provable debt contracted 'prior to commencement of the bankruptcy proceed-'ings. It is clearly within the rule, and hence the 'fifth assignment of error is not sustained.

"If the defendant had succeeded in introducing 'testimony tending to prove the allegations of fact em-'bodied in the offer rejected by the court there might 'have been a question of *fact* for the consideration of 'the jury; but as the case stood, there was no error in 'charging as complained of in the sixth specification."

Brackett v. *Dayton*, 34 Minn., 219. Judgment was entered in the District Court for Ramsey county on October 14th, 1882, in favor of plaintiffs and against defendant in this action, which was brought upon a judgment rendered in 1872. On December 8, 1883, the defendant made an application to the court to vacate the judgment, upon the grounds that the plaintiffs were not the holders of the claim sued upon, or to stay executions and all proceedings under the judgment to await the determination of the question of the defendant's discharge as a bankrupt; and he appeals from an order by Brill, J., denying his motion.

"MITCHELL, J. Appeal from an order denying a 'motion to vacate and set aside a judgment. One of 'the grounds on which the motion was made was the 'plaintiffs were not the owners of the note or debt out 'of which this judgment sprang. The records showed 'that this had become *res adjudicata* between the par-'ties twice before this action was ever brought. This 'is a conclusive reason, to say nothing of others, why 'the judgment should not be vacated on any such 'ground."

"The second ground upon which defendant moved 'to have the judgment vacated was the fact of the 'pendency of bankruptcy proceedings in the United 'States District Court in which he had been adjudged 'a bankrupt. The facts, as appears from the record, are 'that defendant filed his petition in bankruptcy on the

'29th day of February, 1868, and was subsequently ad-
'judged a bankrupt; that on the 28th of December,
'1875, he filed his petition for his discharge; but that
'he has done nothing whatever towards obtaining his
'discharge since that date. When this action was
'commenced in March, 1882, defendant appeared and
'answered, setting up the pendency of these same
'bankruptcy proceedings, to which plaintiff replied,
'alleging an unreasonable delay on the part of the bank-
'rupt in endeavoring to obtain his discharge. The issue
'thus made was tried in June, 1882, a judgment ordered
'for the plaintiff, which was entered October 14, 1882.
'The motion to vacate the judgment was made Novem-
'ber 30th, 1883—over one year after it was rendered."

"On this state of facts it is perfectly manifest that the
'refusal of the court to vacate and set aside the judgment
'was correct in any view of the case, unless the judg-
'ment was *void;* and this, as we understand him, is
'defendant's contention. His position seems to be that
'the Federal bankrupt law avoids, of its own force, all
'judicial proceedings in other courts the instant one of
'the parties is adjudged a bankrupt; that such an adjudi-
'cation by the bankrupt court divests all other tribunals
'of jurisdiction, and renders all subsequent proceedings
'void. This once not uncommon error was long since
'entirely exploded. The ordinary tribunals are not
'deprived, by mere force of the adjudication of bank-
'ruptcy, of jurisdiction over suits against the bankrupt;
'the proceedings in the other courts may, when neces-
'sary, be arrested or controlled by the bankruptcy court
'(not by acting upon the courts, but upon the parties);
'but in the absence of any such interference the juris-
'diction of other courts remains unimpaired, and their
'judgments are valid. (*In re Davis*, 1 Sawyer, 260;
'*Eyster* v. *Gaff*, 91 U. S., 521; *Davis* v. *Friedlander*,
'104 U. S., 570.)

"There is nothing in the suggestion that plaintiffs
'should have obtained permission of the bankrupt court
'to bring this action. They had never proved their
'claim against the defendant, or in any manner become
'parties to the bankruptcy proceedings. Neither were
'they interfering with these proceedings, nor with any
'property in the custody of the bankrupt courts. (*Din-
'gee* v. *Becker*, 9 Phila., 196.")

We now present the opinion of the court of last resort in Illinois in the case now here before this court.

CRAIG, J., delivered the opinion, WALKER, SHELDON, SCHOFIELD, and MULKEY, JJ., concurring:

"Plowden H. Ball brought an action of debt against 'Charles W. Boynton at the September Term, 1877, of 'the Circuit Court of Stephenson county, to recover the 'amount of a decree which had been rendered in the 'Circuit Court of that county several years prior to the 'commencement of the action. At the following April 'Term, 1878, of the court, the defendant by his attorney 'filed a plea of the general issue. On the 15th day of 'April, 1878, Boynton was adjudged a bankrupt in the 'United States District Court for the northern district 'of Illinois. At the December Term, 1879, of the 'Stephenson Circuit Court the cause was called for 'trial, and the parties appeared by their attorneys, 'waived a jury, and a trial was had before the court, 'which resulted in a judgment in favor of the plaintiff 'for the amount of decree, together with the interest 'thereon. After the rendition of the judgment, and on 'the 23d day of December, 1880, Boynton received his 'final discharge in bankruptcy, and on the 25th day of 'March, 1881, he filed this petition and motion in the 'Stephenson Circuit Court for a perpetual stay of pro-'ceedings on the judgment, on the ground that he had 'received his discharge in bankruptcy. The motion 'was heard by the court and overruled. An appeal was 'taken to the appellate court, where the judgment of 'the Circuit Court was affirmed, and Boynton appealed 'to this court.

"Whether a perpetual stay of proceedings to enforce 'the collection of the judgment against the bankrupt 'shall be granted, depends upon the construction to be 'placed upon the bankrupt act of 1867.

"Section 5106 declares: 'No creditor whose debt is 'provable shall be allowed to prosecute to final judg-'ment any suit at law or equity therefor against the 'bankrupt until the question of the debtor's discharge 'shall have been determined; and any such suit or pro-'ceedings shall, upon the application of the bankrupt, 'be stayed to await the determination of the court of

'bankruptcy on the question of the discharge, provided 'there is no unreasonable delay on the part of the 'bankrupt in endeavoring to obtain his discharge, and 'provided, also, that if the amount due the creditor is 'in dispute, the suit, by leave of the court in bank-'ruptcy, may proceed to judgment for the purpose of 'ascertaining the amount due, which amount may be 'proved in bankruptcy, but execution shall be stayed.'

"Section 5117 provides that 'No debt created by 'fraud or embezzlement of the bankrupt, or by his 'defalcation as a public officer, or while acting in a 'fiduciary character, shall be discharged.'

"Section 5118 declares, that 'No discharge shall re-'lease, discharge or affect any person liable for the 'same debt for or with the bankrupt.'

"Section 5119 provides that 'A discharge in bank-'ruptcy duly granted shall, subject to the limitations 'imposed by the two preceding sections, release the 'bankrupt from all debts, claims, liabilities, and 'demands which were or might have been proved 'against his estate in bankruptcy.'

"It will be observed that Boynton, after he was 'adjudged a bankrupt, did not appear in the Circuit 'Court, where the action was pending against him, and 'enter a motion for a continuance of the cause or a stay 'of proceedings until the determination of the court of 'bankruptcy on his discharge, as he might have done 'under section 5106 of the bankrupt act; and on account 'of a failure on the part of Boynton to procure such 'stay of proceedings, it is contended that the judgment 'rendered against him was not affected by his final dis-'charge subsequently obtained.

"The question involved has led to much discussion 'among law writers, and, although it has often arisen 'in the courts of England and the United States, the 'decisions are by no means harmonious. We have been 'referred to a large number of cases decided in Eng-'land, where the courts hold that a judgment rendered 'against a bankrupt after he was declared a bankrupt, 'and before the final discharge was obtained upon a 'pre-existing debt, is released by the discharge. Among 'the number is *Blanford* v. *Foot*, 1 Cowp., 138, which 'is a leading case on the subject. We do not question

'the rule in England; it is uniform; but the decisions 'in England cannot be relied upon as authority here, 'for the reason that they are predicated on a provision 'in the statute of that country which does not exist in 'our bankrupt law. The substance of the statute is, if 'the creditor did obtain judgment before final discharge 'and take the debtor in execution, he should be dis-'charged on motion. (See dissenting opinion of Bron-'son, C. J., in *Clark* v. *Rowling*, 3 N. Y., 225, and 'opinion of the court in *In re Gallison*, 2 Lowell Cir. C., '74, where the statute of England is quoted and con-'sidered.) If our bankrupt law contained the same pro-'vision as that of England, then the decisions of those 'courts might be regarded as authority; but such is not 'the case.

"As stated before, in the United States the decisions 'on the question are in direct conflict. Under the 'bankrupt act of 1841, in Maine, Massachusetts, and 'some other States, it was held that a discharge in bank-'ruptcy did not release a judgment rendered against 'the bankrupt pending the proceedings in bankruptcy; 'that where a judgment is recovered on a debt provable 'under the bankrupt proceedings against the bankrupt, 'the original debt becomes merged and extinguished 'in the judgment, which is not provable against the 'bankrupt. (*Holbrook* v. *Foss*, 27 Me., 441; *Fisher* v. '*Foss*, 30 Me., 459; *Pike* v. *McDonald*, 32 Me., 418; '*Sampson* v. *Clark*, 2 Cush., 173; *Woodbury* v. *Perkins*, '5 Cush., 86; *Faxon* v. *Baxter*, 11 Cush., 35.)

"In New York, Vermont, and some other States it 'has been held that if the debt upon which the judg-'ment was rendered was one provable against the 'bankrupt, and would be cut off by the discharge, the 'judgment rendered upon such debt would be barred 'and cut off by the discharge. (*Harrington* v. *Mc-'Naughton*, 20 Vt., 293; *Downer* v. *Rowell*, 26 Vt., '397; *Dresser* v. *Brooks*, 3 Barb., 429; *Clark* v. *Row-'ling*, 3 N. Y., 216.)

"We shall not, however, stop to determine what is 'the correct rule under the act of 1841, as there is, in 'our judgment, a marked distinction existing between 'the act of 1841 and the act of 1867. The act of 1841 'made no provision whatever for the postponement of

'an action pending against a bankrupt between the 'time he was adjudged a bankrupt and the time he 'received a final discharge; this seeming defect in the 'act of 1841 was cured by the provision contained in 'Sec. 5106, in the act of 1867, in these words: 'Any 'such suit or proceedings shall, upon the application of 'the bankrupt, be stayed to await the determination of 'the court of bankruptcy on the question of the dis-'charge.' Here is a complete remedy provided, if the 'bankrupt desire to avail of it, to prevent a judgment 'from being rendered against him until he can procure 'a final discharge. The object, of course, was to pre-'vent a judgment—which the discharge might not 'relieve the bankrupt from, as held by the courts of 'Maine and Massachusetts—until the discharge should 'be granted, which the bankrupt could then plead in 'bar of the pending action against him, and thus pre-'vent the rendition of a judgment in the court in which 'the action might be pending.

"Under section 5119 Boynton's discharge released 'him from all debts which were or might have been 'proved against his estate in bankruptcy. Was the 'judgment in question a debt of that character? Obvi-'ously the section means all indebtedness existing at 'the time Boynton was declared a bankrupt, which was '15th April, 1878. At that date this judgment was 'not in existence, as it was not rendered until Decem-'ber, 1879; but it is said the debt upon which the 'judgment was rendered was in existence at the time 'Boynton was adjudged a bankrupt; and as the original 'indebtedness was provable, and would have been 'barred by the discharge, the judgment stands in the 'same position. It may be regarded a well-settled and 'uniform rule of law that every cause of action will, if 'recovered upon, merge into the judgment or decree. '(Freeman on Judgments, Sec. 216.) If the action is 'upon a simple contract, a bond, or a judgment of a court 'of record, in either case, when a recovery is had, the 'cause of action is merged into the judgment when a 'judgment has been rendered. Freeman in his work 'on Judgments, Sec. 217, says: 'Every judgment is 'for most purposes to be regarded as a new debt; the 'chief, and perhaps the only, exception being in cases

'where the technical operation of the doctrine of merger
'would produce manifest hardship, and even these cases
'are by no means universally excepted. This new debt
'is not in general affected by the character of the old
'one.' The author in Sec. 245, however, says: 'In no
'class of cases has the technical operation of the doc-
'trine of merger been so frequently limited as in those
'where the effect of a discharge under law for the relief
'of insolvents had to be determined.'

"An able discussion of this subject may be found in
'*Gould* vs. *Hayden*, 63 Ind., 448, where a judgment had
'been rendered in a court of record in that State, and
'afterwards a recovery was had on the judgment in the
'State of Ohio. The question was, whether the first
'judgment was so merged and absorbed in the second
'judgment as to destroy the lien and validity of the first
'judgment. It is there said, the plaintiff may enforce
'its collection by the process of the court in which he
'obtained his judgment, or he may, if he elect so to do,
'use his judgment as an original cause of action, and
'bring suit thereon in the same or some other court of
'competent jurisdiction, and prosecute such suit to
'final judgment. This procedure he may pursue as
'often as he elects, using the judgment last obtained as
'a cause of action on which to obtain the next succeed-
'ing judgment; but the very freedom with which this
'may be done, *ad infinitum*—and we know of no law
'or legal principle which would prevent its unending
'repetition—is, to our minds, a convincing and con-
'clusive reason why each successive and personal judg-
'ment ought to and must be regarded as a complete
'merger and extinguishment of the preceding judgment
'with all its qualities and incidents. Each successive
'personal judgment is a new debt of record, in which
'the precedent debt, though theretofore evidenced by a
'judgment, is as completely merged and absorbed as it
'would have been if it had been evidenced by note, bill,
'bond, or any other evidence of debt.

"In the case of *In re Gallison*, 2 Lowell Cir. C., 74,
'LOWELL, justice, in discussing this question, after re-
'viewing various authorities, says: 'For the reasons
'given, and upon a careful examination of the decisions,
'I am of opinion that a judgment obtained after the

'adjudication in bankruptcy creates a new debt, which 'cannot be proved in bankruptcy, because the judg-'ment is a merger and creates a new debt; and that the 'judgment creditor cannot oppose the discharge, be-'cause he has no provable debt, and because the dis-'charge will be no bar to the judgment.'

"There are cases which hold a contrary view. While 'the general doctrine of merger is admitted, it is held 'that the rendition of a judgment does not, within the 'meaning of the law, create a new debt. Such are '*Dresser* v. *Brooks*, 3 Barb., 429; *Dawson* v. *Hartsfield*, '79 N. C., 334; *In re Stephen Brown*, 3 Bank. Register, '585. But we are satisfied the better doctrine, and that 'too established by the later decisions, is that a judg-'ment rendered after an adjudication in bankuptcy 'creates a debt which cannot be proved against the 'bankrupt's estate; that the indebtedness existing 'prior to the recovery becomes merged in the judgment.

"If, however, we are not correct in this view, there 'there is another ground which will preclude the bank-'rupt from impeaching the judgment, which has been 'clearly stated by the Supreme Court of Massachusetts 'in *Bradford* v. *Rice*, 102 Mass., 472. The court, after 'holding that a debt provable against the bankrupt, 'when reduced to judgment pending the proceedings, 'is merged and extinguished, then says: 'The creditor, 'by taking judgment and so changing the form of his 'debt and securing to himself the benefit of conclusive 'and permanent evidence of it, and an extension of the 'period of limitation of an action thereon, is held on 'his part to have elected to look to the debtor per-'sonally, and to abandon the right to prove against his 'estate; and the debtor, on the other hand, who might 'have protected himself by moving the court in which 'the action was pending for a continuance, in order to 'afford him an opportunity to obtain and plead a cer-'tificate of discharge, is held, by omitting to make such 'a motion before judgment, to have waived the right to 'set up his certificate against the plaintiff's claim; and 'therefore the rights of both parties must be governed 'by the judgment which the one has moved for and the 'other has suffered to be rendered.'

"What right has Boynton to complain that a judg-

'ment was rendered against him in the Stephenson 'Circuit Court? He was served with process, appeared 'and pleaded to the action, he knew the action was 'pending when he was adjudged a bankrupt, and he 'knew that he could obtain a stay of proceedings by 'entering a motion for that purpose, until he could ob-'tain a discharge, and plead it in bar of the action; and 'yet he made no effort whatever to procure a stay, but, 'on the other hand, voluntarily submitted to a trial. It 'was his own negligence which led to the judgment 'which he now seeks by motion to avoid. A motion 'for relief, as against a judgment of this character, may 'be treated as an equitable proceeding, and it is a well-'established rule that a party who fails to make a de-'fense at law shall not be permitted to come into equity 'and have such defense allowed, unless he can show he 'was prevented by accident, mistake, or fraud, which is 'not pretended in this case. (*Jevne & Almini* v. 'Osgood, 57 Ill., 345.) The Circuit Court did not lose 'jurisdiction of the case, because Boynton was adjudged 'a bankrupt; but as was held in *Eyster* v. *Gaff*, 91 'Otto, 521, it was the duty of the court to proceed with 'the cause until by some pleading the court was in-'formed of the changed relations of the parties. (See 'also *Holden* v. *Sherwood*, 84 Ill., 92.) The Circuit 'Court could do nothing less than proceed with the 'case to final judgment; and as the judgment is to be 'regarded as the joint act of Boynton, who of his own 'choice allowed it to be rendered, and of the plaintiff, 'upon whose motion it was rendered, the rights of these 'two parties must be regarded as finally settled by that 'judgment. We are not aware of any case that holds 'that where a defense might have been made to a 'pending cause of action, but was not set up, solely 'through the negligence of a defendant, that such de-'fendant may afterwards interpose the same defense to 'the judgment which has been rendered against him. 'It is ordinarily enough that a party has had a day in 'court and an opportunity to plead his defense. The 'bankrupt act in clear terms provides for the stay of an 'action which may be instituted against the bankrupt 'until his discharge is passed upon. This salutary 'provision was incorporated into the law for the purpose

'of enabling a defendant, situated as was appellant, to 'plead his discharge in bar of the action; but as appel- 'lant gave no heed whatever to the law, and through 'his own negligence allowed a judgment to be rendered 'against him, what reason can be urged for holding 'that the judgment shall not be binding upon him? 'None is perceived.

"The judgment of the appellate court will be affirmed.

"SCOTT and DICKEY, J.J., dissent:

Bowen v. *Eichel*, 91 Ind., 22. ELLIOT, J.:

"It is alleged in the complaint of the appellee that 'on the 4th day of March, 1878, the appellants insti- 'tuted an action against him in the Superior Court of 'Vanderburg county, and on the 15th day of the month 'obtained judgment against him; that on the 11th day 'of the same month he was adjudged a bankrupt under 'the general law of the United States, and on the 13th 'day of August, 1878, obtained a discharge. The re- 'lief sought is an injunction restraining the collection 'of the judgment obtained by the appellants. A de- 'murrer to this complaint was overruled and exception 'reserved; the answer of the appellants avers that there 'was due service of summons in action instituted by 'them; that all proceedings were regular; that they 'never filed any claims against the estate of the appellee, 'but relied entirely on the judgment.

"The controlling question in this case is whether the 'appellee, having failed to defend the action instituted 'against him, is entitled to the benefit of the discharge 'awarded him in the bankruptcy proceedings?

"There is much conflict in the cases, but we are 'inclined to think that the view that the defendant 'must interpose the proceedings in bankruptcy as 'a defense to the action prosecuted against him in 'State Courts, is the only one that can be sustained on 'principle.

"It is quite clear that the State Courts have full 'jurisdiction, and, unless some barrier is interposed, 'may carry the cause to judgment; and if the defendant 'desires to change or impede the ordinary course of 'procedure, he must bring the proceedings in bank- 'ruptcy to the attention of the State Court, and secure

'a stay of proceedings. That he has a right to do this 'cannot be seriously questioned. (Blumenstiel's Bank-'ruptcy, 482.) One who has a defense, and full oppor-'tunity to avail himself of it, must make it, or he cannot 'afterwards assail the judgment. If he neglects to 'make good the benefit of his day in court, he is guilty 'of such *laches* as renders his appeal for judicial aid 'unavailing. The question we have in hand was de-'cided as we now decide it in *Steadman* v. *Lee*, 61 Ga., '58. The court there said: 'It will thus be seen that 'the bankrupt must make application in some way 'to have the proceedings stayed in the State Court. 'This he did not do, so far as the record discloses, and 'his own *laches* has allowed this judgment of a court of 'competent jurisdiction to be rendered against him. 'We hold, therefore, that the judgment is good, and 'that his discharge being subsequent thereto, does not 'relieve him from its operation.'

"In discussing this question Lowell, J., said: 'The 'argument for the side which the defendant assumes 'in this case appears to be much the stronger. Not 'only the technical doctrine of merger is involved, 'but the defendant has had his day in court and one 'opportunity to plead his defense; and I take it to be 'a rule of the highest importance that a defense which 'might have been made to the original cause of action 'can never be made to the judgment. Now, the bank-'rupt act provides most carefully for a stay of suit until 'the defendant's charge is passed upon; giving; giving, 'by fair implication, a power to the District Courts even 'to enjoin actions in State Courts contrary to the gen-'eral practice. All this is for the very purpose of en-'abling the bankrupt to plead his discharge. If he does 'not choose to avail himself of this right, what possible 'ground is there for saying that the judgment shall not 'bind him? Are we to inquire in each case why his 'plea was not set up, or why it was overruled? It may 'be that the State Court was of the opinion that the 'discharge, if granted, would be no bar. We can now 'impeach their decision collaterally. It may be that 'the bankrupt intends not to set upon the discharge 'against this creditor. We cannot authorize him to 'reconsider this determination; it may be that he was

'surprised.' (*In re Gallison*, 5 Nat. Bank Reg., 353.) 'In support of this opinion are cited *Holbrook* v. 'Foss, 27 Me., 441; *Fisher* v. *Foss*, 30 Me., 459; *Pike* v. 'McDonald, 32 Me., 418; *Sampson* v. *Clark*, 2 Cush., '173; *Woodbury* v. *Perkins*, 5 Cush., 86; *Faxon* v. *Baxter*, 11 Cush., 35; *Wolcott* v. *Hodge*, 15 Gray, 547. 'The question is thoroughly considered in the recent 'case of *Boynton* v. *Ball*, 15 Reporter, 783, and the conclusion reached which harmonizes with that stated by 'Lowell, J., *In re Gallison*, *supra*.

"In *Ray* v. *Wight*, 119 Mass., 426, it was said: 'If, 'indeed, neither the bankrupt nor the assignee moves 'for a stay of proceedings the court may proceed 'to judgment. (*Dunbar* v. *Baker*, 104 Mass., 211; 'Cutter v. *Evans*, 115 Mass., 27.)'

"In *Doe* v. *Childress*, 21 Wall. 642, it was said that "Where the power of a State Court to proceed in a suit 'is subject to be impeached, it cannot be done except 'upon an intervention by the assignee, who shall state 'the facts and make the proof necessary to terminate 'such a jurisdiction. In *Kent* v. *Downing*, 44 Ga., 116, 'the court say: "The assignee may on his own motion 'be made a party, if for no other reason than to have 'it properly made known to the court that the defendant has become bankrupt. He has also a right to 'move to dismiss the attachment. The adjudication of 'bankruptcy must be known to the court in some 'authentic mode. It may be denied, and the State 'Court cannot take notice of the judgment of other 'courts by intuition. They must be brought to the 'notice of the court, and this cannot be done without 'parties."' It was held in case from which we have 'quoted that as the assignee had failed to intervene in 'the State Court and question the validity of the attachment, he could not afterwards impeach it; and this 'establishes the principle which he have indicated as 'the correct one; for if the assignee is charged with the 'duty of interfering and bringing the bankruptcy proceedings before the State Court, much more is the '*debtor*, who is personally and *directly* interested in 'securing an effective discharge. If it be negligence 'on the part of the officer of the law to allow the State 'Court to proceed uninformed, it certainly must be so

'for the debtor to *allow* his day in court to pass *unused*.

"As sustaining the conclusions stated by us, we also 'cite *In re Mansfield*, 6 Nat. Bank. Reg., 388; *Bradford* 'v. *Rice*, 102 Mass., 472. In *Dormire* v. *Cogly*, 8 Blackf., '177, it was held that a judgment rendered after adjudi-'cation in bankruptcy was not affected by the discharge; 'and although this decision was made under the bank-'rupt act of 1842, we think it has an important bearing 'on the present case, inasmuch as it holds that dis-'charges do *not* release judgments rendered subsequent 'to the adjudication; and this being granted, it must 'follow that the discharge relied on by the appellee is 'unavailing.

"If he would have avoided this result he should 'have secured a stay of proceedings and not have 'allowed the old debt to be transformed into a new one 'later than the adjudication, for upon such debts—that 'is, debts created subsequent to the adjudication—the 'discharge does not operate.

"When the debts of the appellants were put into 'judgment their claims were merged and their right of 'action bound up in the judgment, and their debt was, 'therefore, subsequent to the adjudication in bank-'ruptcy, and not embraced by the discharge. This 'doctrine of merger extends so far as to merge a judg-'ment on which an action is brought in the last judg-'ment and to destroy the lien of the former. (*Goula* 'v. *Hayden*, 63 Ind., 443.) If the judgment has this 'force where it rests on a debt evidence by a judgment, 'it must surely have it when it rests on an ordinary 'chose in action."

Judgment was reversed.

On petition for a rehearing, this case was again considered and the petition overruled October 12th, 1883.

Wells et al. v. *Edmison*, 22 Northwestern Reporter, 497. PALMER, J.:

"The pleadings and findings in this record show that 'on the 28th day of August, 1878, the plaintiffs, as co-'partners under the name of M. D. Wells & Co., com-'menced an action upon an account for goods sold and 'delivered against the defendant, by personal service of

'process, in the Circuit Court for Buchanan county, in 'the State of Iowa, which was the court of general juris- 'diction. The defendant made no appearance or an- 'swer, and at the October Term of 1878, on the 29th 'day of October, judgment was rendered against him 'for $577.50 and costs. After the commencement of 'that action, and on the 31st day of August, 1878, the 'defendant filed his petition in bankruptcy in the 'United States District Court for the Southern District 'of Iowa, and such proceedings were had therein that 'in April, 1880, he obtained a discharge in the usual 'form. This action was brought upon the judgment; 'and the only defense interposed by the defendant is 'the discharge in bankruptcy. The trial court held, 'for the purposes of this case, that the demand in judg- 'ment was discharged, and that the plaintiff could not 'recover. Judgment dismissing the action, and for costs, 'was entered against the plaintiff, from which this ap- 'peal is taken.

"'The sole question presented upon this appeal is 'whether a discharge granted under the late bankrupt 'law impairs, or at all affects, a judgment recovered 'in a court of competent jurisdiction, subsequently to 'the filing of the petition in bankruptcy, which by the 'statute is 'deemed to be the commencement of pro- 'ceedings of bankruptcy.' (Rev. St. U. S., Sec. 4991.) 'While there is some conflict in the cases, especially in 'regard to the doctrine of merger involved in the ques- 'tion, we are convinced, by the recent authorities cited 'and the principle established by the courts of this 'country as to the conclusive effect of a final judgment, 'that the defense here interposed should not prevail. 'In *Bradford* v. *Rice*, 102 Mass., 472, the action was 'like this case at bar, upon a judgment recovered in 'another State, pending proceedings in bankruptcy; 'and it was ruled that the certificate of discharge was 'no defense to the action. Gray, J., gives the opinion. 'The first paragraph contains the substance of the de- 'cision:

"'The ruling of the court below was in accordance 'with a series of decisions of this court, by which it 'had been held that if, after the institution of proceed- 'ings in insolvency or bankruptcy, judgment is ren-

'dered upon a debt provable under these proceedings, 'the original debt is merged and extinguished in the 'judgment, and the judgment is not provable against 'the estate of the debtor, nor discharged by the certificate; 'and this not merely because such a merger takes effect 'by the rules of the common law, but because the 'creditor by taking judgment, and so changing the 'form of his debt, and securing to himself the benefit of 'the conclusive and permanent evidence of it, and an 'extension of the period of limitation of an action 'thereon, is held, on his part, to have elected to look 'to the debtor personally, and to abandon the right to 'prove against his estate, and the debtor on the other 'hand, who, might have protected himself by moving 'the court in which the action was pending for a con-'tinuance, in order to afford him an opportunity to 'obtain and plead a certificate of discharge, is held, by 'omitting to make such a motion before judgment, to 'have waived the right to set up his certificate against 'the plaintiff's claim; and therefore the right of both 'parties must be governed by the judgment which the 'one has moved for and the other has suffered to be 'rendered.'

"This decision is followed and approved in later 'cases in the same court. (*Cutter* v. *Evans*, 115 Mass., '27; *Ray* v. *Wight*, 119 Mass., 426.) In *Boynton* v. *Ball*, '105 Ill., 627, the same conclusion was reached in the 'Circuit, Appellate, and the Supreme Court upon the 'question here involved. The Supreme Court reviews 'the question upon both the grounds stated in the 'Massachusetts case, and, while recognizing the conflict 'which has existed in the courts concerning the doc-'trine of merger by judgment, says on this point: 'We 'are satisfied that the better doctrine, and that, too, 'established by the later decision is, that a judgment 'rendered after adjudication in bankruptcy creates a 'debt which cannot be proved against the bankrupt's 'estate; that the indebtedness existing prior to the re-'covery becomes merged in the judgment.'"

"Then, referring to the other grounds of the decision 'in the Massachusetts case, the court says:

"'The Circuit Court did not lose jurisdiction of the

'case because Boynton was adjudged a bankrupt; but, 'as was held in *Eyster* v. *Gaff*, 91 U. S., 521, it was the 'duty of the court to proceed with the cause until, by 'some pleading, the court was informed of the changed 'relation of the parties. (See also *Holder* v. *Sherwood*, '84 Ill., 92.) The Circuit Court could do nothing less 'than proceed with the case until final judgment; and 'as the judgment is to be regarded as the joint act of 'Boynton, who of his own choice allowed it to be ren-'dered, and of the plaintiff upon whose motion it was 'rendered, the rights of these two parties must be re-'garded as finally settled by the judgment. We are 'not aware of any case that holds that where a defense 'might have been made to a pending cause of action, 'but was not set up solely through the negligence of a 'defendant, such defendant may afterwards interpose 'the same defense to the judgment which has been 'rendered against him. It is ordinarily enough that a 'party has had a day in court and an opportunity to 'plead his defense. The bankrupt act in clear terms 'provides for the stay of an action which may be in-'stituted against the bankrupt until his discharge is 'passed upon. This statutory provision was incorpo-'rated into the law for the purpose of enabling a de-'fendant situated as was appellant to plead his dis-'charge in bar of the action; but as appellant gave no 'heed whatever to the law, and through his own negli-'gence allowed a judgment to be rendered against him, 'what reason can be urged for holding that the judg-'ment shall not be binding upon him? None is per-'ceived.'

"The same question has recently been decided in '*Bowen* v. *Eichel*, 91 Ind., 22, in harmony with the de-'cisions above cited; and this decision is based mainly 'upon the proposition that if the defendant fails to in-'terpose a stay of proceedings upon the intervention of 'bankruptcy, he must abide the consequence of the 'judgment.

"These decisions are sustained by numerous author-'ities in like cases. (*In re Garrison*, 5 N. B. R., 353, by 'Judge Lowell; *In re Mansfield*, 6 N. B. R., 388; *Hol-'lister* v. *Abbott*, 31 N. H., 442; *Holbrook* v. *Foss*, 27 Me., '441; *Pike* v. *McDonald*, 32 Me., 418; *Sampson* v. *Clark*,

'2 Cush., 173; *Faxton* v. *Baxter*, 11 Cush., 35; *Cutter* v. 'Evans, 115 Mass., *supra; Steadman* v. *Lee*, 61 Ga., 58; 'Revere Copper Co. v. *Dimock*, 90 N. Y., 33.) The cases 'cited *contra* appear to have been decided upon a limited 'and exceptional view of the doctrine of merger.

"But, *independently* of the question of merger, we are 'clearly of the opinion that the defense here interposed cannot prevail without violating another principle—that the judgment is final and conclusive as to 'every matter of defense existing at the time. That the 'act of 1867 provides an ample remedy, whereby the suit 'in lower court might, upon the application of the defendant, have been stayed to await the determination 'of the court in bankruptcy on the question of discharge, and the judgment therein prevented, is no 'longer an open question. (Rev. Stat. U. S., sec. 5106; 'Hill v. *Harding*, 107 U. S., 631; S. C., 2 Sup. Ct. Rep., '404; *Ray* v. *White*, 119 Mass., 426; *Page* v. *Cole*, 123 'Mass., 93.) But no such application having been made, 'that the court retained the complete jurisdiction, and 'could properly proceed to judgment. (*Doe* v. *Childress*, '21 Wall., 642; *Eyster* v. *Gaff*, 91 U. S., 521; *Holden* v. *Sherwood*, 84 Ill., 92; *Amador C. & M. Co.* v. *Mitchell*, '59 Cal., 168; *Cutter* v. *Evans*, 115 Mass., 27; *Ray* v. 'Wight, 119 Mass., *supra; Hill* v. *Harding*, 107 U. S., 'supra.

"These cases show that the remedy of the statute is 'in the nature of personal privilege on the part of bankrupt. It is said by Justice Gray in the last case cited, 'as he had before declared when Chief Justice of the 'Massachusetts court, (*Ray* v. *Wight*, 119 Mass., 428,) 'that if neither the bankrupt nor his assignee in bankruptcy applies for the stay of proceedings, the court 'may of course proceed to judgment. And the extent 'of this statutory remedy is to afford a complete defense 'in this action. The stay of proceedings is to await the 'determination of the court in bankruptcy 'on the question' of the discharge, 'evidently for the purpose of 'enabling the bankrupt to plead his discharge, and to 'plead it in bar of the action.' It is so held in the Indiana, Illinois, and Massachusetts cases, and assumed or 'conceded to be so in the other cases cited. In *Ray* v. 'Wight, *supra*, the court plainly says that one of the

'objects of this provision is 'to protect the bankrupt, in 'case he obtain his certificate, from having the original 'cause of action against him merged in a judgment.' 'And the same principle is declared by the Court of 'Appeals in *Revere Copper Co.* v. *Dimock*, 90 N. Y., 37, 'where the discharge was obtained after a default, and 'five days before the entry of judgment. The court 'there says: 'The defendant was not without a remedy. 'He could have applied to the Massachusetts court to 'open his default and permit him to set up his dis-'charge.'

"This remedy of the statute, therefore, being in the 'nature of a personal privilege, and the defendant having 'waived it as he did, how can he now avoid the legal 'consequences of the obligation created by the judg-'ment of the court? This obligation no longer rests 'upon contract or consent, for '*judicium reditur in* '*invitum.*' A judgment is essentially different from a 'contract in its nature and elements, and is deemed in 'law as 'obligation of record.' (2 Amer. Lead. Cas., '819, 820; *O'Brien* v. *Young*, 95 N. Y., 428, and cases 'cited; *State* v. *City of New Orleans*, 109 U. S., 285; 'S. C., 3 Sup. Ct. Rep., 211.) From the time the 'Supreme Court, in *Mills* v. *Duryee*, 7 Cranch, 481, '(1813,) decided that *nil debet* is not a good plea to an 'action upon a judgment of another State, it has been 'uniformly held that a party bound by such an obliga-'tion is estopped from alleging or proving that at the 'time he did not owe the debt. (*Christmas* v. *Russell*, '5 Wall., 290; *Cromwell* v. *County of Sac.*, 94 U. S., '351; *Revere Copper Co.* v. *Dimock*, *supra*; *Jordon* v. '*Phelps*, 3 Cush., 545; *Fuller* v. *Shattuck*, 13 Gray, '70; *Stephens* v. *Howe*, 127 Mass., 164; *Patrick* v. *Shaffer*, '94 N. Y., 423.) And within the general principle of '*res adjudicata* it is well established that the judgment 'of a court of competent jurisdiction is final and 'conclusive, not only as to any matter of defense actually 'determined, but as to every other defense or remedy to 'defeat or diminish the recovery which might have 'been interposed, but was omitted or otherwise waived. '(*Jordan* v. *Van Epps*, 85 N. Y., 427, and cases cited; '*Wells' Res Adj.*, Sec. 251, 67; *Marriott* v. *Hampton*, '7 Term R., 269; *Le Guen* v. *Gouverneur*, 1 Johns.,

'Cas. 492; *Walker* v. *Ames*, 2 Cow., 428; *Bink* v. '*Wood*, 43 Barb., 320; *Clemens* v. *Clemens*, 37 N.Y., 74; '*Noble* v. *Merrill*, 48 Me., 140; *Bridge Company* v. '*Sargent*, 27 Ohio St., 233; *Bates* v. *Spooner*, 45 Ind., '493; *Kelly* v. *Donlin*, 70 Ill., 378; *Dewey* v. *Peck*, 33 'Iowa, 242; *Bank* v. *Stevens*, 46 Iowa, 429; *Mally* v. '*Mally*, 52 Iowa, 654; *Parnell* v. *Hahn*, 61 Cal., 131.)

"In *Jordan* v. *Van Epps*, *supra*, the plaintiff sought 'to recover dower in certain lands. In former partition 'suit she had neglected to assert her statutory remedy 'for the admeasurement of dower, and it was held that 'the judgment was conclusive of matters omitted in 'her defense. The court there states the rules: 'The 'judgment is final and conclusive between the parties, 'not only as to the matter actually determined, but as 'to every other matter which the parties might have 'litigated, and have decided as incident to or essentially 'connected with the subject-matter of the litigation, 'within the purview of the original action.' 'And in 'the *Sac County* Case, 94 U. S., 352, it is said that, where 'the former judgment was upon the same claim or de-'mand in any subsequent action,' it is a finality as to 'the claims or demands in controversy, concluding par-'ties not only as to every other matter which was 'afforded and received to sustain or defeat the claim 'or demand, but as to any other admissible matter 'which might have been affored for that purpose; 'thus, 'for example, a judgment rendered upon promissory 'note is conclusive as to the validity of the instrument 'and the amount due upon it, although it be subse-'quently alleged that the perfect defenses actually ex-'isted, of which no proof was offered; such as forgery, 'want of consideration, or payment. If such defense 'were not presented in the action and established by 'competent evidence, the subsequent allegation of their 'existence is of no legal consequence. The judgment 'is as conclusive, so far as future proceedings at law are 'concerned, as though the defense never existed.'

"We conclude, therefore, that the discharge of the 'defendant, which might, by obtaining a stay of pro-'ceedings, have been pleaded in bar of the former 'action, is no defense to any action on the judgment, 'and that no plaintiffs are entitled to recover."

SMITH, J., concurring:

"I concur in the conclusion, but not upon the ground 'that the judgment is a merger of debt; that I regard 'as a mere fiction. The judgment no more merges or 'extinguishes the debt than does a promissory note 'merge the debt when given on settlement of an ac- 'count or on settlement of an unliquidated or disputed 'claim of any kind. But I concur solely on the ground 'that the defendant has *had his day in court*, and fail- 'ing *there* to interpose the bar to the action, and per- 'mitting judgment to go against him, he cannot now, 'when sued upon the judgment, interpose a defense 'which he might have interposed to the original 'action."

Negligence of Boynton.

A bill was filed to open a decree and allow a reinvestigation, on the ground of negligence of counsel, in a suit at law in not attending court, the inexperience of other counsel employed, and ignorance of practice, and advice by his counsel that the cause would not be tried, whereby the decree was entered.

Held, That the negligence of the counsel whom he had employed to attend to his case was same as his own negligence, and he must suffer the consequences.

Yates v. *Monroe*, 13 Ill., 219.

A complainant in a bill in chancery seeking to enjoin a judgment obtained against him on the ground that the contract of sale on which the judgment had been rendered had been rescinded, held not to be entitled to relief, for the reason that he had ample opportunity to have interposed the defense of rescission to the suit at law, and neglected so to do. Say the court:

"It is a firmly-established rule that a party failing to 'make a defense at law shall not be permitted to come 'into equity and have such a defense allowed, unless 'he can show he was prevented by accident, mistake, 'or fraud. None of these grounds was shown to have 'existed in this case; on the contrary, appellants knew 'this suit was pending, and Osgood urged them to close 'the matter. They had known for years that the suit

'had not been dismissed, and that Osgood could at any 'time take judgment for the want of a plea, and still 'they made no defense. The defense was complete at 'law, and they failed to make it in that suit, and are 'estopped from seeking relief in equity."

Jevne & Almini v. *Osgood*, 57 Ill., 345.

A complainant in a bill to enjoin a judgment which had been rendered on the award of an arbitrator alleged that the arbitrator failed to give the parties notice of the hearing before him.

Held, That as this fact must have been known to the complainant at the time the suit at law was brought on the award, and was then tried, *or could have been tried*, chancery cannot relieve in such case.

Hubbard v. *Hubbard*, 61 Ill., 230.

A complainant in a bill in chancery alleged that, being a party to two important suits in a certain county where his presence was necessary as a witness, and consequently being unable to attend in another county (Clay) where there was a suit pending against him, he caused an affidavit for continuance to be made and forwarded to his attorney at Clay county, where court was sitting for the purpose of obtaining a continuance of the Clay county suit; which affidavit set forth the facts as to the other two suits in the other county, and the necessity of his being in attendance on them, and that so he could not be at the Clay Circuit Court; that he was duly sworn to this affidavit, but by mistake of the officer omitted to affix his seal to the jurat by reason of which omission or mistake of the officer, the Clay Circuit Court held the affidavit insufficient, and rendered judgment against him.

Held, "That this bill does not allege, with that dis- 'tinctness requisite to admit proof of the fact, that the 'complainant had ever retained or employed any attor- 'ney to appear for him in that court; nor does it appear 'that any motion was made for a continuance, or that 'the affidavit was ever presented to or passed upon by 'the court. If any attorney had appeared and filed pleas, 'the case could not have been disposed of by default 'until reached upon regular call of the docket. In such

'case, if the motion had been promptly made, there 'might have been time before the case was reached for 'an amendment, by getting a seal attached; or the court, 'upon discovering the mistake, might, in its discretion, 'have suspended proceedings for the purpose of the 'amendment. As the case is presented by the bill, the 'accident of omitting the seal and its results do not ap-'pear to be *unmixed with the negligence or fault of the* '*defendant in the judgment.*"

Smith v. *Allen*, 63 Ill., 475.

A bill filed to set aside a judgment where defendant was duly served, employed an attorney, exhibited to such attorney receipts against the claim on which the suit was brought, his attorney assured him he had a good defense, and agreed to attend to case, and told defendant he need give himself no further trouble about it, and defendant relied on his attorney, and gave no further attention to the matter.

The attorney failed to attend to his client's case; there was a judgment by default, and although the attorney was pecuniarily utterly irresponsible.—

Held, complainant entitled to no relief; that no diligence was shown on part of the defendant; that *he* ought to have prepared for trial; that his attorney's negligence was his own negligence.

Kern v. *Strausberger*, 71 Ill., 413.

The complainant, in a bill to set aside a judgment against him, and to state a partnership account, charged that the judgment was unjust; and the basis of the charge was, that since the rendition of the judgment he had discovered entries in books which showed mistakes in the partnership settlement, and that the judgment was erroneous and inequitable, and that the facts were not fully known to the complainant at the time of the trial at law.

Held, that there being no allegation made of any diligence or of any examination of the books and papers *previous* to the trial at law, and no excuse given why such examination was not had sooner, though *four* years and more had elapsed since the dissolution of the partnership and before the rendition of the judgment, there is no shadow of excuse for such gross *laches* on the part

of the complainant; and in the exercise of reasonable diligence he might have made his defense at law.

The rule, as recognized by this court in *Vennum* v. *Davis*, 35 Ill., 568, is thus laid down by MARSHALL, C. J., in *Marine Ins Co.* v. *Hodgeon.* 7 , 333:

"It may safely be said that any fact which clearly 'proves it to be against concience to execute a judg-'ment, and of which the injured party could not have 'availed himself in a court at law, or of which he might 'have availed himself at law, but was prevented by 'fraud or accident *unmixed with any fault or negligence* '*of himself* or his AGENTS, will justify on application to 'a court of chancery."

Before resort can be had to a court of equity for relief against a judgment at law there must not only be a good legal defense, but the party must be deprived of it by accident, mistake, or fraud, and without any negligence on his part. (*Winchester* v. *Grosvenor*, 48 Ill., 517; *Ames* v. *Snider*, 55 Ill., 498.)

It is manifest in this case that the party might have been prepared with his defense to the suit at law. He had ample time—four years—in which to make examination and discover the alleged errors, and he had free access to the books and papers.

The omission to make his defense is chargeable to his own *laches*. As was said by the Lord Chancellor in *Standon* v. *Edwards*, 1 Vesey, Jr., "It would be ex-'tremely dangerous to let parties keep evidence in their 'pockets, and then say that, if produced, it would have 'such an effect."

Palmer v. *Bethard*, 66 Ill., 530.

The Rev. Laws 74, p. 582, provide that the failure to keep the tumbling-rod connecting the horse-power with a threshing-machine boxed or secured while running shall be a complete defense to any action brought for services rendered by or with a machine where the tumbling-rod had not been so secured.

Suppose a suit brought for services rendered with a threshing-machine, the tumbling-rod of which had not been secured, and the defendant should put in defenses, but omit to make that of the tumbling-rod not having

been secured, and judgment should be against defendant, does any one seriously suppose that upon summary application to stay execution, on ground that the rod had not been secured, any court would entertain it a moment?

Or suppose another statutory defense—that of usurious interest to have been paid to such an amount that if applied upon it would have paid down a note, and suit is brought on such note, but in making his defense the maker omits to set up this usury, and there be judgment against him; does any one suppose that an application to stay execution on ground of usury would be at all considered?

Howell v. *Glover*, 65 Geo., 466. Howell moved to set aside certain judgments against him in favor of Glover on substantially the following grounds:

(1.) Because he has been adjudicated a bankrupt prior to the rendition of the judgments.

(2.) Because, at a previous term and in another case, he had placed before the court a certificate of his adjudication in bankruptcy and obtained a stay of proceedings, and thought that it applied to all cases pending against him, and that it would be unnecessary for him to attend court further. The judge certified that he had not seen the certificate or adjudication in bankruptcy since the former case, and the bankruptcy was not pleaded, nor the adjudication placed before him in this case.

(3.) Because he had employed attorneys, and supposed they would do what was necessary in the case; but they disagreed with him as to the terms of their employment, and had their names stricken from the docket.

Glover answered, denying the sufficiency of the grounds of the motion, or that he was in any way concerned in preventing Howell from obtaining a stay of proceedings, or had anything to do with the disagreement between himself and his counsel. He denied the consolidation. By consent, the motion as to all the judgments was argued as one case.

The motion was refused and *movant* excepted.

"JACKSON, *Chief Justice.*

"Howell made a motion to set aside a judgment ren-

'dered against him on several grounds set out in the 'record. On analyzing these grounds, they will be 'found to be reduced to but two—first, and mainly, that 'the judgment was rendered *after* his adjudication as a 'bankrupt, and, secondly, that he was under the im-'pression that he had notified the judge of said adjudi-'cation, and thought his counsel would attend to the 'case, and it would be continued until the final result 'of his application for discharge as a bankrupt."

"It appears from the record and certificate of the 'judge that no plea was filed, nor was there any appli-'cation to him of any sort to stay the proceedings in 'the case. Therefore *Steadman* v. *Lee*, 61 Ga., 58, 'controls this point."

"Nor does it help the plaintiff in error that at the 'term before in other cases the judge had seen the cer-'tificate of his adjudication. The court must be *judi-'cially* informed by some sort of *application to stay pro-'ceedings* in the pending case. What the judge knows 'by what transpired in other cases, or of his own 'knowledge, the court does not judicially know in a 'case pending for legal trial before it.

"Nor is the party relieved by the failure of his coun-'sel. It seems from the record that they had their 'names stricken out on account of some misunderstand-'ing about fees, and when the case was called did not 'and would not respond, though their attention was 'called to the matter."

"The plaintiff in error did not appear when called, 'and the court could not well do otherwise than proceed 'with the case."

"Judgment affirmed."

Dimock v. *Revere Copper Co.*, 117 U. S., 559, is, we submit, a strong case disposing of the question raised by plaintiff in error in this case; it certainly establishes that the Circuit Court of Illinois, in which the action of debt had been brought, to which action Boynton had appeared and pleaded, notwithstanding he afterwards filed his petition in bankruptcy, still continued to have jurisdiction of the case. He did nothing to apprise the State Court of his bankruptcy proceedings, but over 19 months after he had been adjudicated a bankrupt, came into the State Court, and not even then,

when he might still have obtained a stay, he, on the contrary, joined the plaintiff in carrying the case forward to final trial on the merits on the defense he had originally put in, whereby a judgment was rendered against him. He was, and had for 19 months been, fully armed with an ample authority, had he seen fit to invoke it, which would then and there have instantly arrested that court's further procedure, but he was silent when he should have spoken. He said by his conduct to the plaintiff, "I waive my undoubted 'right to stay this proceeding; I am assured of my de-'fense to your suit on the grounds on which I have 'already placed it, and waive my right to here arrest 'these proceedings; on the contrary, resting my defense 'on its merits, I join you in waiving a jury, and consent 'to the trial by the court of the issues as heretofore 'formed."

With his own consent the court proceeded with the case, and it resulted in a judgment against him—a judgment which, to employ the language of Justice Gray, "the one had moved for, and the other had suffered 'to be rendered."

It is true that in *Dimock* v. *Copper Co.* this court said, "that under proper circumstances, even after judgment, (a discharge) might be made the foundation for setting (a judgment) aside and admitting the defense" of the discharge; and in the instances cited—*Ray* v. *Wright*, 119 Mass., 426—the bankrupt on his appearance in the State Court applied for a stay of proceedings, which was denied; and the judgment was reversed because of it. The same fact occurred in *Page* v. *Cole*, 123 Mass., 93; and so also in *Golden* v. *Bloskopf*, 126 Mass., the bankrupt had applied to stay proceedings.

In all these cases the bankrupt *did* apprise the State Court of his bankruptcy, and sought to *there* before trial avail its protection. In the case at bar Boynton, with a certified copy of his adjudication as a bankrupt in his possession, waited over 19 months after he had obtained *it;* and at that late day, when it would still, if interposed, have availed him, not only neglected to apply for a stay, but actually joined us in carrying forward his case to judgment. Surely these cannot be those "proper circumstances" contemplated by this court in their judgment in the *Dimock* case.

II.

But suppose, for argument, it be admitted that the rendition of our judgment of December 9th, 1879, did not so merge the original debt, but that the discharge will operate on the debt, it is further submitted, that if such discharge can operate on such original debt, yet it cannot do so if the *character* of that debt be such that it is excepted from the discharge.

In this case, then, if we are to go back to the original debt, we must take it as we find it, established by the terms of the decree. That decree does most clearly find and establish a fiduciary debt from Charles W. to Stewart G., and having so fixed the character of this debt as fiduciary, requires Charles W. to account and pay over to the complainants in the creditors' bill such moneys, and gives execution for the same, so that the trust, which before the decree existed for the benefit of Stewart G., now, by virtue of the decree, exists for benefit of complainants in the decree, of whom the plaintiff is the survivor.

The decree, upon which the suit in this case was brought, finds and establishes a trust or fiduciary debt.

Stewart G. Boynton placed $1,500 in hands of Charles W., with which to enter lands, for locating and entry of which he was to have *an interest in the lands*, and no more—a joint ownership in them; the balance of the interest in the same to be in Stewart G., he having furnished the money. This was their contract.

Afterwards Charles W. joined with one Park in entering a lot of land, (Park having an interest of his own,) using said $1,500, and took title to himself and Park jointly; that Charles W. exchanged and used the legal title he had thus taken to himself in part payment for a stock of goods; and that, after deducting his compensation, the interest of Stewart G., in the avails of the lands in Charles W.'s hands, was $4,612.40, for which, with interest, he was held to account to Ball & Griffin to amount of $6,223.01, the amount of the decree against him.

The defendant was to locate and enter land with Stewart G.'s money, and, when he had done so, became simply a joint-owner with Stewart G. to the value of

his services rendered in locating and entering the same; that was the extent and effect of their contract.

This was no partnership, as it had no element of *sharing any profits or losses* which might result to Stewart G., from whatever he might afterwards do, or permit to be done, with his own undivided interest in the land. In this condition of things, defendant converted Stewart G.'s interest in the land into goods, and held the avails of that interest in his hands at the entry of the decree, for which trust fund he was held by said decree to account to the complainants.

The court will, therefore, see that no partnership case has any bearing here.

But this case is in effect and principle the same as *Matteson* v. *Kellogg*, 15 Ill., 548, where H. G. Wright had received $400 with which to enter lands for certain parties; did not do it, went into bankruptcy, and got his discharge and died. On suit against his estate, his discharge was set up, but the Supreme Court held this a fiduciary debt, and so excepted from the discharge.

Nor did the fact that Charles W. was by his contract to have an interest in the land as his compensation for the location and entry affect the fiduciary or trust nature of the transaction, as a trustee may stipulate for compensation.

Constant v. *Matteson*, 22 Ill., 560.

In *Treadwell* v. *Holloway* the plaintiff consigned to defendants a lot of agricultural implements to be sold for not less than $5,154.46, the defendants to retain for themselves all over that sum.

Defendants sold the goods, but did not remit, and afterward went into bankruptcy. The plaintiffs brought suit, and were met by the discharge, but the Supreme Court of California held this debt to be a fiduciary one, and that it was excepted from the discharge.

Treadwell v. *Holloway*, 12 Bank. Reg., 63.

The defendant, in effect, says to this court, the judgment did not so merge the debt on the decree, but that the discharge operates against it; yet the judgment on the decree did so merge the decree that, although it may have been a fiduciary debt while in decree, yet that

element is eliminated from it by judgment, which position simplified is this:

"There is no merger as to the effect of my discharge, 'but there is a merger as to destroying the fiduciary 'nature of your debt."

We submit that if merger is good for the defendant, it is equally so for the plaintiff; as was pertinently said in 12 Bankruptcy Register, 527:

"It will not do to say that a judgment is forbidden by 'law to be recovered, and affords no proof of the ex-'istence of a debt; and to say also that it is a good enough 'judgment to merge the original claim and prevent proof 'by the owner. A party cannot thus blow hot and cold 'with the same breath."

But the authorities are clear that the merger of the old cause of action into a new judgment does not, if the original debt was excepted from the operation of a discharge, discharge such debt—it is still excepted. If the decree fixed the character of the debt as between the complainants and defendant Charles W., *as fiduciary*, the bringing of a suit *on* that decree—as is fully shown and admitted by both parties hereto—and the obtaining judgment thereon, in nowise changed or disturbed the fiduciary element or nature of the claim; that remained as before. A decisive authority on this point is 6 Bissell, 455, where it is laid down—

"That a debt created by fraud is not discharged in 'bankruptcy, even though reduced to a simple judg-'ment for money, in which there is no mention of 'fraud. If the original action was based upon fraud, the 'fraud is not merged in the judgment.

"Where the record shows that an original demand 'or cause of action sprang from fraud, the judgment 'does not merge the fraud, and it is not released by a 'discharge in bankruptcy. (S. C., 13 Bank. Reg., 52.)

"A discharge in bankruptcy does not operate to dis-'charge a guardian's debt of the bankrupt. The fact 'that such debt is evidenced by a judgment does not 'divest it of its fiduciary character. (80 North Car., '332.)

"Judge Blatchford, in case of Patterson, 1 Bank. Reg., '307, after stating that the point involved was whether

'the debt in that case was one excepted by the bank-'rupt act from the operation of a discharge, says: 'It 'is claimed on the part of the bankrupt that the debt, 'being in the shape of a judgment, this court cannot, 'in applying the 33d section, go behind the judgment 'to see whether the claim on which the judgment was 'recovered was created by fraud; that the judgment, 'which is now the only debt, was created by the claim, 'and not by the fraud; and that though the judgment 'was created by the claim, and the claim by the fraud, 'yet the judgment was created by the fraud. *This view 'is unsound;* wherever the debt, no matter whether it 'be in the shape of a judgment or any other form, was 'created by fraud—had its root and origin in fraud— 'then it is not discharged.'"

Warner v. *Cronkhite*, 6 Bissell, 455.

Another part of this same case disposes of the Massachusetts authority cited by defendant's counsel, by showing that that authority applied to a *statute* which specifies the claim in the *form* in which it existed at the time of the insolvency proceedings, so that as Ball's claim was in the *form* of a declared trust by the terms of the decree against Charles W. at the time he went into bankruptcy, then their own Massachusetts authorities do not apply; they apply to cases where, *before* insolvency, the form in which the debt existed excepted it; but if *before* insolvency, that form was changed by judgment, the debt, in a new *form*, was not excepted from discharge.

But the language of the Bankrupt Act does not go to form; it is broader:

"No debt *created* by fraud, * * * or while act-'ing in any fiduciary capacity, shall be discharged."

We need not suggest that any case holding that a judgment on a debt created by fraud is not discharged is, in principle, applicable to one where judgment is rendered on a debt of a fiduciary character.

And, lastly, it may be inquired of defendant why, if you had gone into bankruptcy, as may reasonably be inferred, more as against our claim, it being the heaviest,

than any other, and which you then *knew* was in suit—why, with your knowledge of this, did you wait *nineteen* months *after* you were adjudicated bankrupt, and then, without a word about your bankruptcy, *join us in submitting* your case for trial, help us get the judgment; and, *twelve* months *after* the judgment we obtained on that trial, on 25th March, 1881—nearly three years—*first intimate* that you would rely on your discharge. The plaintiff calls attention to the grossness of this laches and the unfairness of such conduct.

Defendant in error.

The ~~appellant~~ therefore submits:

1. That the very numerous authorities cited by the plaintiff as to whether, after a judgment against a bankrupt pending his bankruptcy proceedings, but before discharge received, the court will stay execution, are each and every of them decisions made upon bankrupt acts having nothing like the 5106th section of Act 1867; that being a *new* section, and are no authorities as to the duty that section imposes upon the bankrupt.

2. That the 5106 section afforded defendant an ample opportunity and remedy, of which he neglected to avail himself for over nineteen months *before* our judgment.

3. That he then came into court, and without any intimation that he had gone into bankruptcy, or should rely on his bankruptcy, actually *joined us in submitting his case for trial*, by which we obtained our judgment incurring the costs thereof, and of the execution issued thereon, and is, therefore, now estopped from interposing his discharge.

4. That the rendition of the new judgment upon the old decree made such a new and essentially different debt that it thereby became not provable against his estate, and is not affected by his discharge.

5. That the debt itself was a fiduciary one, and excepted from the discharge.

6. That even *after* defendant had been adjudicated bankrupt, he waited over fifteen months before he took

a single step toward interposing *it*—altogether, from his adjudication on 15th April, 1878, to 25th March, 1881, a space of nearly three years, when now he files his motion to stay execution—a most unreasonable sleeping on his rights, inexcusable laches, and gross negligence.

It is therefore respectfully claimed that the judgment of the Supreme Court of Illinois should be affirmed.

J. A. CRAIN,
Attorney for Defendant in Error.